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NORTH CAROLINA OCEANFRONT PROPERTY AND PUBLIC WATERS AND BEACHES: THE RIGHTS OF LITTORAL OWNERS IN THE TWENTY-FIRST CENTURY

JOSEPH J. KALO*

During the late twentieth century, the North Carolina barrier islands became summer recreational destinations of choice. People flocked to the coast and development of oceanfront property surged. With more people on the beach, there were more conflicts between the beach-going public and oceanfront property owners. With more oceanfront development, the risks of property damage and economic loss from hurricanes and other storms generated demands for seawalls and beach nourishment projects to protect these investments. In resolving these conflicts and demands, questions about the nature and extent of the littoral rights of North Carolina oceanfront property owners frequently arise. In this Article, the author examines the traditional list of littoral rights, North Carolina case law, and legislative enactments and concludes that the traditional list no longer accurately describes the rights of oceanfront property owners in the twenty-first century. In the course of this examination, the author identifies what common law and statutory littoral rights oceanfront property owners have today, and explores the circumstances under which an oceanfront property owner may lose these rights. The author concludes the Article with a list of the modern littoral rights of oceanfront property owners.

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INTRODUCTION

For much of North Carolina's history, the scope of the littoral¹ rights of oceanfront property owners² was not a subject of litigation.³

1. The traditional term for oceanfront property is "littoral" and is derived from *litus*, the Latin word for shore. JOHN M. GOULD, A TREATISE ON THE LAW OF WATERS § 148, at 301 n.1 (Chicago, Callaghan & Co. 2d ed. 1891). The term "littoral" was also applied to the rights of property owners on small lakes and ponds. 1 WATERS AND WATER RIGHTS § 6.02(b) at 6-99 (Robert E. Beck ed., Lexis Nexis ed. 1991, repl. vol. 2001) [hereinafter 1 WATERS AND WATER RIGHTS]. "Littoral" as used in this Article is confined to oceanfront and inlet front property.

2. The phrase "oceanfront property owner" as used in this Article includes land that fronts on the inlets connecting the Atlantic waters with the waters of the sounds. In some instances, due to the wording of particular statutes, a distinction may be drawn between ocean and inlet front property, but the general thesis of this Article is that the littoral rights of oceanfront and inlet front owners are, and should be, the same.

3. In fact, the first Supreme Court of North Carolina case, in which the scope of littoral rights of oceanfront or inlet front property owners was a litigated issue was decided in 1970. *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 177 S.E.2d 513 (1970). *Carolina Beach Fishing Pier* is discussed at several places later in this Article. An earlier case, *Capune v. Robbins*, contains in dicta a discussion of the littoral right to pier out, but no littoral right was actually at issue. 273 N.C. 581, 160 S.E.2d 881 (1968). *Capune* is discussed *infra* Part IV. Only one other supreme court case, *State v. Johnson*, even has any possible relevance to the scope of any littoral right of either oceanfront or inlet front property owners. 278 N.C. 126, 179 S.E.2d 371 (1971). *Johnson* is discussed *infra* Part III.D.2. It was not until 1999 that the Court of Appeals of North Carolina decided a case in which oceanfront or inlet front littoral rights were in issue. See *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 517 S.E.2d 406 (1999) (involving the migration of an inlet and the parties' right to control erosion). Since that time there has been only one other such case dealing with similar issues. See *Slavin v. Town of Oak Island*, 160 N.C. App. 57, 58-61, 584 S.E.2d 100, 101-02 (2003). Both of the court of appeals cases are discussed in this Article *infra* Parts IV.B.3 and V.A. In all other decided cases involving the existence and scope of the rights of waterfront property owners, the subject waterfront property is riparian, soundfront, or located on other inland coastal waters.

Perhaps this was due in part to the slow pace and low intensity of development on the North Carolina barrier islands,⁴ the difficulty of access to the more remote regions,⁵ and the lack of opportunities for conflict between oceanfront property owners, the State, and the general public. All of that changed during the latter half of the twentieth century. During that period, improved access brought a markedly increased intensity of private oceanfront development and thousands of beachgoers to the barrier islands.⁶ As the density of

The general assumption has been that waterfront property is waterfront property and owners of waterfront property on navigable waters share the same set of unique rights irrespective of whether the navigable water is a river, a sound, or the Atlantic Ocean. *See, e.g., Capune*, 273 N.C. at 588–39, 160 S.E.2d at 885–86 (attributing the same rights as appurtenant to all lands abutting public waters and, at various places in the opinion, citing as authority both cases involving riparian property and littoral property interchangeably). However, in this Article, I contend that assumption is flawed.

4. *See Migrating Barrier Islands*, in STATE OF THE COAST REPORT (North Carolina Coastal Fed'n 1999), at 8 [hereinafter *Migrating Barrier Islands*] (detailing the history of development in North Carolina). Until the 1920s, development was very sparse on the northern Outer Banks due to its remote location. *Id.* In the 1930s, coastal state Highway 12 was built and development began. *Id.* The first incorporated town was Nags Head in 1923, and between 1923 and 1970 only seventeen more towns were incorporated with a total of 11,879 residents and three times as many seasonal visitors. *Id.*; *see also* THOMAS J. SCHOENBAUM, ISLANDS, CAPES, AND SOUNDS: THE NORTH CAROLINA COAST 91 (1982) (explaining that by 1978 the twenty-three mile stretch of the outer banks north of Dare County was not developed due to the absence of a public road, which ended near Duck); *id.* at 212–14 (describing that until the 1950s Bogue Banks was virtually undeveloped and remained so until a new bridge was completed in 1971, giving easy access to that part of the island); *id.* at 238–41 (explaining that Bald Head Island remained undeveloped until the early 1980s due to a lack of access); *id.* at 242 (describing that in the early 1980s, Sunset Beach, a small island, was relatively undeveloped).

5. *See Migrating Barrier Islands*, *supra* note 4, at 8.

6. *Id.* (stating that “[a]fter 1960 several decades of hurricane inactivity provided an atmosphere conducive to beach development” on the northern Outer Banks). Other authors have observed:

Currently six of the eight North Carolina coastal counties are growing faster than the state average; two are growing at well over twice the state average. Nor will the growth along our coasts diminish anytime soon. Estimates indicate that by 2010, more than 125 million Americans will be living near the coast, a 60 percent increase from 1960.

ORRIN PILKEY ET AL., THE NORTH CAROLINA SHORE AND ITS BARRIER ISLANDS: RESTLESS RIBBONS OF SAND 10 (Duke Univ. Press 1998). The 1970 Currituck County census recorded a population of 6,900. SCHOENBAUM, *supra* note 4, at 90. As the 1970s progressed, the previously stable population began to grow rapidly. *Id.* “By 1980, there were 10,600 permanent residents and several thousand additional seasonal residents in Currituck County.” *Id.*; *see also id.* at 241–43 (discussing how development along the Brunswick County barrier island beaches has almost entirely occurred in the last twenty-five years).

The influx of a large number of sun-worshipping, beach-seeking tourists, the establishment of numerous public beach access points, and oceanfront property owners’ heightened concerns about privacy and private property rights have disturbed the

oceanfront development increased so too did the consequences of living close to ocean waters. In many places the severe erosive effects of hurricanes, storms, waves, currents, jetties, dredging, and other activities have left the waters of the Atlantic lapping at the foundations of million dollar oceanfront homes, condominiums, hotels, and businesses,⁷ and have led to increasing demands that the State protect these investments by re-establishing erosion-prone beaches through beach nourishment projects⁸ or by permitting owners of threatened structures to construct protective seawalls or otherwise harden the shoreline.⁹ Then, when the State responds with an expensive beach nourishment project financed through the expenditure of large amounts of public money, some of the owners of previously threatened oceanfront property resent the implication that in the process they have lost some portion of what they viewed as their traditional common law property rights.¹⁰ Or, if the State

traditionally easy accommodation of private and public interests on the state's shores. Conflicts, as of yet unresolved, have arisen over the public's right to use the privately-owned dry sand beach lying above the mean high tide line. *See generally* Joseph J. Kalo, *The Changing Face of The Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C. L. REV. 1869 (2000) (examining the relationship between seaward boundary lines and the public's right to use the dry sand beaches of North Carolina).

7. *See* Martha Quillin, *Nature Washing Homes Away*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 9, 2001, at B1 ("About half of the North Topsail houses facing severe erosion are imminently threatened. Three houses . . . already have been condemned because the ocean has scoured several feet of sand from around their support piers and has torn apart electrical, water and sewer connections."); *see also* Jerry Allegood, *Mason Inlet on the Move*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 14, 2002, at A3 ("With water slapping at the sandbag barricade at the resort, many worried condo owners bailed out."); Jerry Allegood, *Seaside Towns Need Sand, Money*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 10, 1999, at A1 (describing the effects of Hurricanes Dennis and Floyd on oceanfront homes and property).

8. *See Migrating Barrier Islands*, *supra* note 4, at 10 (describing that after a thirty-five year lull in hurricane activity, Hurricanes Bertha (1996), Fran (1996), Bonnie (1998), Dennis (1999), and Floyd (1999) hit the Carolina coast, washing away protective dunes and leading concerned oceanfront property owners to ask the government for help in putting sand on their beaches); *see also* Richard Stradling and Wade Rawlins, *Beach Towns Line up for More Sand*, NEWS & OBSERVER (Raleigh, N.C.), July 6, 2003, at A1 ("The sea gnaws a couple of feet from most North Carolina beaches each year, through erosion and rising water levels. To keep homes from teetering over the surf, more and more communities are looking to the federal government to help put the sand back.").

9. *See, e.g.*, Craig Whitlock, *Gawkers Flock to Shell Island: 'They're at the Mercy of the Ocean Now'*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 19, 1998, at A1 (discussing the North Carolina seawall ban and Shell Island's property owners' desire for an exemption from that ban, believing a seawall is their only hope for saving Shell Island).

10. *See, e.g.*, *Slavin v. Town of Oak Island*, 160 N.C. App. 57, 58–59, 584 S.E.2d 100, 101 (2003), which is discussed in detail in Part IV.B.3 of this Article. The central issue in *Slavin* was the claim of oceanfront property owners alleging their right of access had been

refuses to allow the construction of some protective device, the oceanfront property owners, whose houses or other structures face destruction from the relentless forces of nature, believe that they are being denied the exercise of some fundamental common law littoral right to protect their property.¹¹ And, the influx of large numbers of sun-worshipping, beach-seeking tourists, the establishment of numerous public beach access points, and oceanfront property owners' heightened concerns about privacy and private property rights have generated conflicts between oceanfront property owners and the beach-goers over the right of the public to use the dry sand beaches of the state.¹² In light of these changes rapidly taking place on the barrier islands of North Carolina, at the beginning of the twenty-first century it seems appropriate to take a serious, detailed look at what are in fact the littoral rights of oceanfront property owners, what limitations exist, and when those rights may be extinguished without paying compensation to the affected oceanfront property owners.¹³

taken when, following a beach nourishment project, they were prohibited from going directly from their oceanfront homes to the nourished beach. *Id.*

11. See, e.g., *Shell Island Homeowners Ass'n, Inc. v. Tomlinson*, 134 N.C. App. 217, 219–20, 517 S.E.2d 406, 409–10 (1999). After the defendants refused to give the plaintiffs a permit to build various hardened erosion control structures, including a sea wall, the plaintiffs filed a complaint, requesting relief for, among other things, “damages for a taking of their property without just compensation by reason of the defendants’ denial of their application for a CAMA permit for construction of a permanent erosion control structure.” *Id.* at 220, 517 S.E.2d at 410. Part V of this Article discusses the question of whether oceanfront property owners have a common law right to erect hardened erosion control structures.

12. This conflict has disturbed the traditional easy accommodation of the private and the public on the state’s shores. At the present time, *Giampa v. Currituck County*, a lawsuit challenging the public right to use the dry sand beaches, is pending. No. 98 CVS 153 (N.C. Super. Ct., filed June 19, 1998). For a description of the lawsuit, see Kalo, *supra* note 6, at 1870–78.

13. This Article does not address the issue of whether the public has a common law customary right to use all dry sand, oceanfront beaches in the state of North Carolina regardless of whether the legal title to the dry sand beach is privately or publicly held. However, it is my position that such a right does exist and any private title to the dry sand beach is encumbered by this public right. Neither an explicit legislative or judicial recognition of such a right would result in the extinguishment of any private interest for which compensation would be constitutionally required. The dry sand beach is that

flat area of sand seaward of the dunes or bulkhead which is flooded on an *irregular basis by storm tides or unusually high tides*. It is an area of private property which the State maintains is impressed with public rights of use under the public trust doctrine and the doctrine of custom or prescription.

Advisory Opinion Ocean Beach Renourishment Projects N.C.G.S. § 146-6(f), Op. Att’y Gen. 279 (Oct. 15, 1996) (emphasis added), available at <http://www.ncdoj.com/DocumentStreamerClient?directory=AGOpinions&file=279.pdf> (on file with the North

The courts, legislatures, and regulators frequently use the terms “littoral” and “riparian”¹⁴ interchangeably.¹⁵ But the central thesis of this Article is that, within the state of North Carolina, the rights of oceanfront property owners are not identical to those of property owners abutting the sounds or coastal navigable rivers and waters. Although their rights are similar in some areas, both judicial and statutory changes in the traditional common law principles have created marked differences in other areas. Consequently, in this Article, the term “littoral” will be used when referring to oceanfront property and the word “riparian” is reserved for all other categories of waterfront property.

Part I of this Article briefly examines the origins of the concept of littoral and riparian rights and identifies those rights traditionally associated with ownership of lands abutting ocean and other navigable waters. Part II of the Article begins the examination of the nature and evolution of littoral rights in North Carolina. It discusses the core right of remaining in contact with the waterbody itself. In Part III, the effect of the natural processes of accretion, erosion, and avulsion on the status of littoral ownership is explored. Part IV

Carolina Law Review); see also Kalo, *supra* note 6, at 1892–96 (examining the relationship between seaward boundary lines and the public’s right to use the dry sand beaches of North Carolina).

14. The term “riparian” historically referred to property abutting rivers and streams. See GOULD, *supra* note 1, § 148, at 300 n.1; A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 3.8 (West 2003) (describing the origin of term “riparian”).

15. See, e.g., 1 HENRY PHILLIP FARNHAM, THE LAW OF WATER AND WATER RIGHTS § 62, at 278–80 (The Lawyer’s Coop. Pub. Co. 1904) (using “riparian rights” as a general term); GOULD, *supra* note 1, § 148, at 300–01 (noting each term is sometimes used to denote the other); see also Johnson v. McCown, 348 So. 2d 357, 360 (Fla. 1977) (noting that the terms are sometimes used interchangeably).

The technically proper term for the water rights of soundfront property owners is “littoral.” See Weeks v. N.C. Dep’t of Natural Res. & Cmty. Dev., 97 N.C. App. 215, 216 n.1, 388 S.E.2d 228, 229 n.1 (1990) (explaining that “littoral” not “riparian” is the proper term for the shore of any land abutting the sea or other tidal water). However, the North Carolina Coastal Area Management Act regulations call the water area over which a soundfront owner has a right of access the “area of riparian access.” See N.C. ADMIN. CODE tit. 15A, r. 7H.1205(o) (Apr. 2003), available at http://www.nccoastalmanagement.net/Rules/Text/t15a_07h.pdf (on file with the North Carolina Law Review). Also, in court cases, the term “riparian” has been used in reference to the rights of soundfront property owners. See, e.g., *In re Protest of Mason*, 78 N.C. App. 16, 25–26, 337 S.E.2d 99, 104 (1985) (referring to a Core Sound front owner as having “riparian rights”). For convenience, this Article will use the term “littoral” only when referring to the water rights of oceanfront property owners, which include owners of inlet front property. See *supra* note 1.

The rights of owners of property on small lakes and ponds are treated somewhat differently from that of owners of property on rivers, streams, sounds, the Great Lakes, or ocean waters and are not part of the discussion of this Article. See 1 WATERS AND WATER RIGHTS, *supra* note 1, § 6:02(b), at 6-99.

examines the impact of artificial additions to the shoreline upon an oceanfront property owner's littoral rights and, in particular, the effect upon the right of access to the waterbody and right of view, if any. Part V examines the oceanfront property owner's right, if any, to construct shoreline protection structures to prevent loss of shoreline and buildings due to shoreline erosion. Part VI concludes with a discussion of the littoral right of access to the navigable portion of the waters, which normally includes the right to pier out. However, it is my contention that, unlike riparian or soundfront owners, oceanfront property owners do not have any right to pier out into ocean waters.

I. THE ORIGIN OF LITTORAL RIGHTS

The concept of littoral and riparian rights is a product of evolving nineteenth-century American jurisprudence. Earlier authorities reflected the view that waterfront property owners possessed no rights to the use of the waterbody different from, or superior to, those of the general public.¹⁶ The waterfront owner's adjacency to the water made it easier for her or him to gain access to the water and exercise her or his public rights of use, but this access to the water was permissive and could be cut off by the State at any time, without compensation.¹⁷ But, by the beginning of the twentieth century, the view that waterfront property owners possessed unique, valuable rights appurtenant to their waterfront property, of which they could not be deprived without compensation, ultimately prevailed.¹⁸ One leading, early twentieth-century authority enumerated these rights as:

16. See, e.g., JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 94, at 116-17 (1909) (stating there are no rights in stream or body of water which are appurtenant to waterfront land).

17. *Id.*; H.G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS § 592, at 620-25 (1st ed. 1975) (stating that riparian owners have no more rights than other members of public in the stream or any lands covered thereby).

18. 1 FARNHAM, *supra* note 15, § 62, at 280 (stating that these rights come to riparian owners by nature and they should not be deprived of them without compensation); LEWIS, *supra* note 16, § 95, at 119 (stating the better and sounder rule that riparian owners have valuable rights of which they may not be deprived without compensation). These riparian rights were always, however, viewed as subordinate to the state's paramount public trust rights in state navigable waters and the federal government's navigation servitude in navigable waters of the United States. See, e.g., *United States v. Willow River Power Co.*, 324 U.S. 499, 510 (1945) (acknowledging the superiority of the federal navigation servitude); *RJR Technical Co. v. Pratt*, 339 N.C. 588, 592, 453 S.E.2d 147, 150 (1995) (stating that title to public trust waters held in trust for public so that they may navigate upon, carry on commerce upon, and fish in without interference by private parties); LEWIS, *supra* note 16, § 95, at 120 (noting the state's paramount right to use waters); 9 POWELL ON REAL PROPERTY § 65.03[3][b][i] (2000) (stating the right of the state to

First. The right to be and remain a riparian proprietor and to enjoy the natural advantages thereby conferred upon the land by its adjacency to the water.

Second. The right of access to the water, including a right of way to and from the navigable part.

Third. The right to build a pier or wharf out to the navigable water, subject to any regulations of the State.

Fourth. The right to accretions or alluvium.

Fifth. The right to make reasonable use of the water as it flows past or leaves the land.¹⁹

And, in the 1903 Supreme Court of North Carolina opinion in *Shepard's Point Land Co. v. Atlantic Hotel*,²⁰ this same enumeration was accepted as a list of vested rights associated with the ownership of North Carolina waterfront property.²¹

The questions for the twenty-first century are: (1) Does this traditional list of rights accurately describe the rights of oceanfront property owners in North Carolina today?; (2) Do oceanfront property owners possess each of these enumerated rights?; (3) What are the dimensions and limitations of each of the rights of oceanfront property owners?; and (4) Have modern uses of oceanfront property given rise to any new right or rights?

protect public trust interests is superior to private water rights); *id.* § 65.13[5] (noting the superiority of federal servitude over private property interests in navigable waters); *see also* 4 WATERS AND WATER RIGHTS § 35.02(c)(1), at 149–56 (Robert E. Beck ed., Lexis Nexis ed. 1991, repl. volume 1996) [hereinafter 4 WATERS AND WATER RIGHTS] (describing waters and property subject to use or regulation by the government without compensation). *But see* *Weeks v. N.C. Dep't of Natural Res. & Cmty. Dev.*, 97 N.C. App. 215, 226, 388 S.E.2d 228, 234 (1990) (“The legislature’s authority to protect public trust rights always is limited by [riparian owner’s] right to retain some use or value of his property.”).

19. LEWIS, *supra* note 16, § 100, at 128–30.

20. 132 N.C. 517, 44 S.E. 39 (1903), *overruled on other grounds by* *Gwathmey v. State ex rel. Dep't of Env't, Health, & Natural Res.*, 342 N.C. 287, 464 S.E.2d 674 (1995). *Gwathmey* does not discuss or question the *Shepard's Point Land Co.* list of rights of owners of property abutting navigable waters. In fact, no North Carolina case has. The issue in *Gwathmey* was what power the General Assembly had to convey to private parties submerged lands lying under navigable waters. *See infra* note 46.

21. *Shepard's Point Land Co.*, 132 N.C. at 537, 44 S.E. at 46.

II. THE CORE RIGHT: TO REMAIN A LITTORAL PROPRIETOR

By definition, littoral property is land that abuts the ocean with ocean waters forming at least one boundary,²² which is typically described as the *mean high water mark* or *mean high tide line*.²³ Traditionally, title to the area landward of the mean high water mark is in the oceanfront property owner²⁴ and title to the area seaward of that mark is held by the state as public trust submerged lands.²⁵ This contact with ocean waters allows the littoral owner continued direct and immediate access to the water itself,²⁶ and it is that continued direct and immediate access that commands the premium typically paid for oceanfront property.²⁷ Consequently, the ability to retain

22. See *supra* note 1.

23. 1 WATERS AND WATER RIGHTS, *supra* note 1, § 6.03(a)(1), at 6-135. See *Carolina Beach Fishing Pier, Inc., v. Town of Carolina Beach*, 277 N.C. 297, 303, 177 S.E.2d 513, 516-17 (1970) (computing the high water mark as an average of high-tide water levels).

24. TARLOCK, *supra* note 14, § 3.35.

25. 4 WATERS AND WATER RIGHTS, *supra* note 18, § 30.01(d)(1), at 23 (discussing state sovereignty over lands below the mean high tide line and the public trust doctrine); *id.* § 30.01(d)(1)(B), at 25 (same); *id.* § 30.02(a), at 39-40 (same); *id.* § 30.02(c), at 44-46 (same).

26. 1 WATERS AND WATER RIGHTS, *supra* note 1, § 6.01(a)(1), at 6-4 ("The first, and most basic, right of a riparian owner is to access to [sic] the water."); *id.* § 6.01(a)(5), at 6-50 (stating "access to the water is the necessary condition to any other riparian right").

27. The traditional littoral rights reflect the generally recognized close bond that exists between beachfront property and the water resource. It is well understood that sellers and buyers factor those rights into the standard valuation of waterfront property. Such an observation needs no citation of authority. But, for those looking for such assurance, there are a large number of cases in which the courts stressed the role, importance, and value of these rights. For example, in an early twentieth-century Florida case, *Thielsen v. Gulf, F. & A. Railway Co.*, the court said: "[i]n many cases, doubtless, the riparian rights incident to the ownership of the land were the principal, if not sole, inducement leading to its purchase by one and the reason for the price charged by the seller." 78 So. 491, 507 (Fla. 1918). In the 1930s the City of Los Angeles used the power of eminent domain to acquire the water in the streams flowing into Mono Lake. See *City of Los Angeles v. Aitken*, 52 P.2d 585, 586 (Cal. App. 1935). The water from the streams was to be diverted to supply the needs of the city. *Id.* One consequence of the diversion was a drastic lowering of the lake to one-tenth of its existing level within five to ten years. *Id.* at 587. The plaintiffs in *Aitken* were shoreline resort owners, whose properties would dramatically decrease in value as a result of the lowering of the lake level. *Id.* In holding that the plaintiffs were entitled to substantial sums as damages for their littoral rights to require the maintenance of the natural level of the lake, the court said:

They purchased land bordering on this unique lake and constructed buildings and improvements thereon for the maintenance of auto camps and pleasure resorts which are dependent for their success upon the income derived from the traveling public which is attracted to this alluring lake by these advantages. These enterprises depend on the continuation of these attractions. Without the existence of this lake and its surrounding attractions the value of the respondents' properties will be practically destroyed. These privileges and attractions constitute important

contact with ocean waters is the core benefit of oceanfront property ownership.²⁸

III. ACCRETION, EROSION, AND AVULSION AND OCEANFRONT PROPERTY

A. *Traditional Common Law Rules*

If, indeed, the most valuable and significant aspect of oceanfront property is its contact with, and access to, ocean waters, the traditional common law rules of property should operate to protect that interest. Maintaining contact with ocean waters necessarily means that the seaward boundary of oceanfront property should always change and move as the shoreline moves through natural cycles and processes.²⁹ When the cycles and processes result in accretion or other additions of beach soil to the shoreline, the increase should benefit and belong to the oceanfront owner to whose shoreline the accretions or additions adhere; if the cycles and processes result in erosion or other loss of soil from the shoreline, then the losses should be sustained by the oceanfront owner. If the common law rules were completely consistent the boundary would

assets in determining the value of their properties. Moreover, among the essential littoral rights which are possessed by the respondents is their lawful right to the unmolested access to the lake.

Id. at 588–89. Even more recently, in a Superior Court of New Jersey, Appellate Division, case, the court observed that “ocean view, beach access, use and privacy are fundamental considerations in valuing beachfront property.” *City of Ocean City v. Maffucci*, 740 A.2d 630, 641 (N.J. Super. Ct. App. Div. 1999).

28. *See, e.g.,* *Young v. City of Asheville*, 241 N.C. 618, 622, 86 S.E.2d 408, 411 (1955) (holding that “[a]n indispensable requisite of the riparian doctrine is actual contact of land with water”); *see also* TARLOCK, *supra* note 14, § 3.31 (“To qualify as riparian land, there must be contact with a watercourse capable of supporting riparian rights.”). Therefore, without contact with ocean waters, any claim of common law littoral rights is meaningless. On the other hand, the General Assembly, by appropriate legislation, may confer statutory littoral rights upon former oceanfront property owners whose lands, as the result of a beach nourishment project, are no longer in direct contact with the ocean. *See infra* notes 149–55 and accompanying text.

29. *See generally* ORRIN PILKEY & KATHARINE L. DIXON, *THE CORPS AND THE SHORE* 23 (1996) (“All beaches, however, exist in a dynamic equilibrium involving four major controls: (1) wave and tidal energy; (2) quality and quantity of the sediment supply; (3) beach shape and location; and (4) the level of the sea.”). When one of these factors change, the others all adjust accordingly. *Id.* For example, storms cause increased wave energy and a temporary rise in sea level. *Id.* To compensate for this higher energy environment, the beach will change its shape. *Id.* Sometimes sand gets moved offshore or the beach flattens out. *Id.* The higher sea level, however, allows the beach to repair itself by allowing waves to reach the dunes or bluffs and wash sand back to the beach, creating a new buffer. *Id.*

always be ambulatory, with its fluctuations shifting the boundary between privately owned uplands and publicly owned waters and submerged lands, but with the oceanfront owner always maintaining contact with the ocean waters. However, the traditional common law rules relating to accretion, erosion, and avulsion lack such consistency.

The traditional rules applicable to the effects of accretion and erosion operate to maintain the oceanfront property owner's contact with the sea. If sand is gradually added to the beach by accretion, the traditional rule is that the accretion belongs to the oceanfront property owner.³⁰ On the other hand, if sand is slowly eroded away by natural forces, the oceanfront property owner loses land.³¹ Thus, an oceanfront property owner's seaward boundary is not a fixed boundary line, but an ambulatory one. With accretion and erosion the seaward boundary always remains the mean high tide line wherever it intersects the shoreline.

But, the common law rule is quite different if the shoreline changes as the result of avulsion—a sudden, frequently dramatic, shoreline change occasioned by the hammering of the shoreline by an event such as a hurricane or the winds and waves of a northeaster or similar violent storm. When such sudden, powerful, natural forces cause a sudden and perceptible change in the contours of the shoreline, the traditional rule is that the seaward boundary of oceanfront property is not affected, does not move.³² For example, if, after a storm, fifty feet of dry sand has been added to the beach, the oceanfront property owner would not hold title to the new dry sand beach because the boundary line is not where the mean high tide line presently intersects the new, expanded beach, but where it intersected the dry sand beach before the storm. In such circumstances, the ocean would no longer be the seaward boundary of the property and, technically, the owner would no longer be a littoral owner and would not possess any common law littoral rights. So, at common law, an avulsive change could result in a loss of that valuable feature of oceanfront property ownership—direct contact with and access to the ocean. On the other hand, if an avulsive event removed fifty feet of

30. See GOULD, *supra* note 1, § 155, at 310–11 (“Land formed by *alluvion*, or the gradual and imperceptible accretion from the water ... belong to the owner of the contiguous land to which the addition is made.”).

31. *Id.* § 155, at 311–12 (“[L]and gradually encroached upon by navigable waters ceases to belong to the former owner.”).

32. *State v. Johnson*, 278 N.C. 126, 146, 179 S.E.2d 371, 384 (1971) (“Avulsion, unlike accretion, works no change in legal title.”); 1 WATERS AND WATER RIGHTS, *supra* note 1, § 6.03(b)(2), at 6-158 to -161.

shoreline, the oceanfront property owner would retain title to the newly submerged lands lying between the present location of the mean high water mark and the pre-storm location.³³

Exactly why this common law discrepancy exists is not entirely clear. In part, it may be related to the fact that the earliest justification for the common law rules of accretion, erosion, and avulsion was not grounded in the policy of protecting the oceanfront property owner's contact with, and access to, the waterbody. In his 1826 treatise, Joseph Angell offers a less than entirely satisfactory explanation for the difference in treatment. According to Angell, when the addition to the shoreline is the result of an avulsive event:

[T]he accession so made belongs to the sovereign, as it is more than a part and parcel of the *fundus maris*, or bottom of the sea, which . . . [is] the property of the sovereign.

To the above rule, however, there is this important exception. If the increase is slow and secret, and is so gradually and insensibly occasioned as renders it impossible to perceive how much is added in each moment of time, it then belongs to the proprietor of the land to which the accession is made . . .³⁴

Thus, the difference in the early treatment of avulsive events and accretion/erosion lies both in a technical view of the source of the addition to the uplands, which is seen as wind and wave action moving the sovereign's submerged soil in such a manner as to rapidly accumulate it above the high water mark, and in the practical ability to ascertain and locate changes in a water boundary.³⁵ The idea that the rules of accretion/erosion are fundamentally linked to the littoral owner's inherent larger right to maintain contact with ocean waters as the shoreline moves through natural cycles and processes is a justification that comes later in the nineteenth century.³⁶

33. See 1 WATERS AND WATER RIGHTS, *supra* note 1, § 6.03(b)(2), at 6-160 ("On the other hand, if land is either covered or uncovered by a sudden and perceptible change in the shoreline, either by action of the water or a change in the course of a stream, the process is called 'avulsion.' Avulsion usually leaves title as before the change in the waterbody.").

34. JOSEPH K. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS, AND IN THE SOIL AND SHORES THEREOF 68-69 (Boston, Harrison Gray 1826). These common law rules were copied from earlier civil law rules, which were supported by the same rationale. *Id.* at 69.

35. *Id.*

36. For example, Professor Gould noted in his treatise:

However, the change in justification did not affect the traditional approach to avulsion, despite the fact that the historical justification for the avulsion rule is strained, illogical, and inconsistent with the general policy of protecting a littoral owner's right of access. Logically, the consequences of avulsion should be no different than those of the natural processes of erosion and accretion.

B. The Traditional Avulsion Rule No Longer Applies to Oceanfront Property

Early in North Carolina's history, the courts accepted the traditional common law rules of accretion, erosion, and avulsion as part of the state's body of common law.³⁷ However, it can be argued that legislation passed by the General Assembly during the twentieth

This right of access is not lost by the gradual formation of new soil upon the margin of the water caused by the action of the tides or current [R]iparian owners, if deprived of the benefit of that situation by extraneous additions, would suffer hardship and injustice

GOULD, *supra* note 1, § 155, at 310; *see also* 1 FARNHAM, *supra* note 15, § 69, at 320 ("One of the most valuable of the rights of the riparian owner is the right to preserve his contact with the water by appropriating the accretions which form along his shore."); *id.* § 71, at 326 ("[T]he rule giving the riparian owner the right to alluvion was adopted to preserve the fundamental riparian right on which all others depend . . . that of access to the water."). In its 1893 opinion in *Lamprey v. Metcalf*, the Minnesota Supreme Court made the following observation:

Courts and text writers sometimes give very inadequate reasons, born of a fancy or conceit, for very wise and beneficent principles of the common law; and we cannot help thinking this is somewhat so as to the right of the riparian owner to accretions and relictions in front of his land. The reasons usually given for the rule are either that it falls within the maxim, *de minimis lex non curat*, or that, because the riparian owner is liable to lose soil by the action or encroachment of the water, he should also have the benefit of any land gained by the same action. But it seems to us that the rule rests upon a much broader principle, and has a much more important purpose in view, viz. to preserve the fundamental riparian right—on which all others depend, and which often constitutes the principal value of the land—of access to the water.

53 N.W. 1139, 1142 (Minn. 1893).

37. The traditional rules of accretion, erosion, and avulsion have been part of the common law of North Carolina since at least 1820. *See* *Murry v. Sermon*, 8 N.C. (1 Hawks) 56, 57–58 (1820) (noting an increase of shoreline soil on Mattamuskeett Lake); *see also* *State v. Johnson*, 278 N.C. 126, 146, 179 S.E.2d 371, 384 (1971) (applying the traditional common law rules to movement of an inlet); *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 304, 177 S.E.2d 513, 517 (1970) (applying the traditional common law rules to beach erosion); *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 228, 517 S.E.2d 406, 414–15 (1999) (applying the traditional common law rules to inlet erosion). These traditional common law principles are applicable except where modified by statute.

century, although not explicitly discarding the traditional avulsion rule with respect to oceanfront property,³⁸ has that effect. When read together, North Carolina General Statutes sections 146-6(a) and 77-20(a) are inconsistent with the traditional avulsion rule and create a single, uniform approach to all natural changes in ocean shorelines.

North Carolina General Statute section 146-6(a), states that “[i]f any land is, by any process of nature . . . raised above the high watermark of any navigable water, title thereto shall vest in the owner of that land which, immediately prior to the raising of the land in question, directly adjoined the navigable water.”³⁹ “[A]ny process of nature” includes hurricanes, northeasters, and wind and wave action and is not limited to slow, gradual additions to the shoreline. Therefore, this section clearly changes the common law avulsion rule governing additions to the shoreline.⁴⁰ But, it does not address the effect on legal title when natural forces create submerged land where once there were uplands. If the natural forces qualify as erosion, then the common law rule places title to such submerged land in the state. But, whether title to submerged lands resulting from an avulsive event lies in the state or remains in the littoral owner would still be dependent on whether the traditional common law rule of avulsion is applied or not.

Fortunately, section 77-20(a) appears to address this question. The plain, unambiguous, unqualified language of section 77-20(a) is that “[t]he seaward boundary of all property, which adjoins the ocean,

38. The term “oceanfront property” as used in this Article includes inlet front property. However, in some instances the language of a particular statute may draw a distinction between the two. For example, section 77-20 applies to property “which adjoins the ocean.” N.C. GEN. STAT. 77-20(a) (2003). Since inlet front property technically adjoins an inlet, arguably section 77-20(a) is not applicable. But, in 1985 when the General Assembly amended section 77-20 and added subsections (d) and (e), defining the term “ocean beaches” and affirming the public common law right to use ocean beaches, the term “ocean beaches” was defined as “the area adjacent to the ocean and ocean inlets.” *Id.* § 77-20(e). Arguably, this suggests that the General Assembly intended the term “ocean” to include both the waters of the Atlantic Ocean and inlets through which those waters flow.

39. *Id.* § 146-6(a).

40. This reading of section 146-6(a) is not inconsistent with section 146-1(d). Section 146-1(d), added in 1995 as part of a piece of legislation designed to address the use of public trust waters and submerged lands by marinas and other facilities, *see infra* note 145, states that “[n]othing in this Subchapter shall be construed to limit or expand the full exercise of existing common law riparian or littoral rights.” *Id.* § 146-1(d). However, the reading given to section 146-6(a) in this Article is not that it expands a *common law* right but, rather, grants waterfront property owners a *statutory right* to additions resulting from avulsive events. Unlike a common law right, if the General Assembly decided to terminate this statutory right by a change in the applicable legislation, the waterfront owner would not have a claim for compensation for the loss of that right.

is the mean high water mark.”⁴¹ An appropriate reading of the statute is that the mean high water mark remains the seaward boundary irrespective of changes in the contours of the shoreline and regardless of whether the changes are the product of the processes of erosion and accretion or the result of avulsion.

In addition to the language of section 77-20(a), common sense and sound policy also require that it be read as a complete rejection of the common law rule of avulsion. The most significant, valuable characteristic of oceanfront property is that it is in contact with the water allowing the owner of the oceanfront property free and unhindered access to the water.⁴² But, application of the avulsion rule would mean that, when there is a sudden, perceptible increase of the dry sand beach, the resulting addition to the shoreline would not belong to the littoral owner. Instead, if the boundary between the privately-owned dry sand beach⁴³ and state-owned public trust submerged lands does not move as the result of an avulsive addition to the shoreline, the addition would belong to the state and be part of the state's public trust lands. The effect of this would be to destroy the littoral owner's common law littoral rights, including the private littoral right of direct access to the ocean, and to create a ribbon of state-owned, dry sand beach.⁴⁴ Such a result would certainly be inconsistent with the expectations of littoral owners who assume that, regardless of the cause, they hold title to any additions to the shoreline and such additions simply extend their littoral property seaward.⁴⁵

41. *Id.* § 77-20(a)(22).

42. *See supra* note 27.

43. An area, although privately owned, is impressed with public rights of use. *See supra* note 13.

44. Although the oceanfront property owner would have the same rights of use of the state-owned, avulsion-created, public trust beach as any other member of the general public, such rights of use are not the equivalent of the private right of use and access possessed by a littoral owner exercising her common law littoral rights to cross land, to which she holds fee title, to reach and access ocean waters. The authority of the State to regulate public uses of publicly owned land is greater than its authority to regulate the use of privately owned land.

45. In *Hughes v. Washington*, the issue was whether accretion belonged to the owner of federal patent oceanfront land or to the state under a state common law rule allocating all accretions to the state. 389 U.S. 290, 290-91 (1967). The *Hughes* Court held that federal law determined the littoral rights of federal patent land and that the traditional common law rule applied. *Id.* at 291. In its opinion the Court observed that “[a]ny other rule would leave [littoral] owners continually in danger of losing the access to water which is often the most valuable feature of their property, and continually vulnerable to harassing litigation challenging the location of the original water lines. *Id.* at 293-94. The observations are equally pertinent to the traditional common law rule governing avulsive

This conclusion becomes especially apparent when examining the consequences of a loss of shoreline due to an avulsive event. The traditional rule has two sides. On one hand, the littoral owner would not have title to additions to the shoreline; on the other, a rapid loss of shoreline would not divest the littoral owner of title to former upland areas that are now submerged lands. What would be the littoral owner's rights with respect to such submerged lands? Would the public have the same rights of use to such submerged lands as they would to the dry sand beach or state-owned submerged lands? Would these privately-owned submerged lands be impressed with public trust rights of use?⁴⁶

Discarding the traditional rule not only avoids these troublesome questions, but also conforms the law to the realities of the coastal environment and the reasonable expectations of oceanfront property owners. The foreshore and dry sand beach are very dynamic areas of the coast and are subject to continuous changes as a result of the forces of wind and water. There is no line drawn in the sand that visibly marks the location of the mean high tide line,⁴⁷ the line

changes. It leaves owners continually in danger of losing access to the water and equally subject to harassing litigation over the location of their seaward boundary.

46. In the only case to directly address the effect of the receding of the shoreline following an avulsive event on the public's right of passage over the foreshore, *People v. Steeplechase Park Co.*, a New York court held that the public retained the same right of passage over the new foreshore as it had over the old. 143 N.Y.S. 503, 509 (N.Y. Sup. Ct. 1913). In other words, the littoral owner may own the foreshore and adjacent submerged lands, but the littoral owner's title to such areas is burdened by public trust rights. The result in the case simply recognizes the fact that the avulsion rule does not accord with common expectations, both public and private, about title to, and rights of use of, the foreshore and public trust submerged lands.

In the landmark case of *Gwathmey v. State ex. rel Department of Environment, Health, & Natural Resources*, the Supreme Court of North Carolina held that the General Assembly had the power to convey state-owned submerged lands without reservation of public trust rights, but that there was a strong presumption that acts of the General Assembly authorizing conveyance of such lands did not intend that such conveyances would in any manner impair public trust rights. 342 N.C. 287, 304, 464 S.E.2d 674, 684 (1995). Absent "clear and specific words," legislation should be construed "so as to cause no interference with the public's dominant trust rights." *Id.* (quoting *RJR Technical Co. v. Pratt*, 339 N.C. 588, 590, 453 S.E.2d 147, 149 (1995)). By analogy, a similar presumption should exist in the judicial application of common law littoral principles. The polestar should be, in the absence of clear, specific, controlling precedent to the contrary, common law principles applied in such a manner as not to impair the public's dominant public trust rights.

47. The *Borax* rule dictates that the mean high tide line is the statistical average of all high and low tides over an eighteen year period. *Borax Consol., Ltd. v. Los Angeles*, 296 U.S. 10, 26-27 (1935). Thus, the mean high tide line is only discernible by an actual survey. The location of the water on the beach on any particular day or hour does not reflect the actual legal boundary separating state-owned submerged land from privately-titled oceanfront property.

typically marking the boundary between privately-owned shorelands and state-owned public trust submerged lands. There is only the water moving up and down the foreshore. Although the dry sand beach is open to public use, the assumption of oceanfront property owners is that the oceanward boundary of their land is the mean high tide line, that it is an ambulatory boundary, and the boundary will remain the mean high tide line, wherever that is physically located on the beach, even as natural forces change the contours of the beach itself. The common law avulsion rule is simply inconsistent with this reasonable assumption.

Therefore, a sensible interpretation of the statutes is that North Carolina has rejected the traditional common law rule governing avulsive changes to the ocean shoreline. In its place is a uniform statutory rule, treating all natural changes to the shoreline the same and grounded in the preservation of an oceanfront property owner's littoral status.

C. Inlet Front Property Treated the Same as Oceanfront?

Section 77-20(a) may be inapplicable to inlet front property because technically such property does not "adjoin the ocean," but adjoins an inlet.⁴⁸ However, a 1998 legislative change in section 77-20 suggests that the word "ocean" now includes "ocean inlet waters." In 1998, the General Assembly amended section 77-20 by adding parts (d) and (e). These parts define the term "ocean beaches," and affirm the public's common law right to use ocean beaches. The added part (e) defines the term "ocean beaches" as "the area adjacent to the ocean and ocean inlets."⁴⁹ Arguably, this suggests that the General

48. Whether section 77-20(a) applies to inlet front property depends upon whether inlet front property "adjoins the ocean" within the meaning of section 77-20. Inlet property technically adjoins the inlet and not the ocean. In 2003, in the interpretation of another statute, section 146-6(f), which contains similar but not identical language, the Office of the Attorney General's drew a distinction between oceanfront and inlet front land. N.C. GEN. STAT. § 146-6(f) (2003). According to the Office of the Attorney General, section 146-6(f), enacted in 1985 in order to determine title to land raised through publicly financed beach nourishment and similar projects, does not apply to inlet front land because that section is limited to land "in or immediately along the Atlantic Ocean." Advisory Opinion Concerning Ownership of Dredged Fill and Accretions on Bogue Banks at Bogue Inlet, Op. Att'y Gen. 558 (Sept. 15, 2003) [hereinafter Advisory Opinion], available at <http://www.ncdoj.com/DocumentStreamerClient?directory=AGOpinions&file=Bogue%20Inlet%20Adv%20Op%20to%20Jean%20Preston%20Final-558.pdf> (on file with the North Carolina Law Review). The wording "in or immediately along the Atlantic Ocean" could reasonably be read as being more restrictive than the words "adjoining the ocean."

49. § 77-20(e).

Assembly intended the term "ocean" as used in section 77-20(a) to include ocean inlet waters.

Even assuming section 77-20(a) is not applicable to inlet front property, section 146-6(a) is. Section 146-6(a) does not distinguish between property adjoining the ocean and property adjoining inlets.⁵⁰ Therefore, insofar as additions to the shoreline are concerned, all additions would belong to the owner of the inlet front property. If section 77-20(a) does not apply to inlet front property, the question would remain whether a loss of inlet front land as the result of an avulsive event changes the waterward boundary of the inlet front land. No reasoned basis to distinguish oceanfront and inlet front property exists, especially since the tidal waters of the Atlantic flow past each, both are subject to the same storm and wind action, and the demarcation between inlet front and oceanfront is a somewhat arbitrary determination of where the ocean ends and inlet begins.⁵¹ Therefore, a uniform rule should be applicable to oceanfront and ocean inlet front property.

D. Erosion and the Extinguishment of All Littoral Rights and Interests

The barrier islands of North Carolina have been moving and changing for thousands of years and will continue to do so in the future.⁵² Shoreline eaten away through erosion may be restored when the natural processes reverse and the shoreline is rebuilt through the process of accretion. During a period of erosion, ocean waters may move completely across an oceanfront lot so that no part of it is left above the mean high water mark; ocean waters and the mean high water mark are then located on the formerly non-oceanfront lot that lay behind the now submerged oceanfront lot. Eventually, natural processes may reverse and accretions to the shoreline may resurrect all or a portion of the submerged lot. If that happens, to whom does the area of accretion belong? Does it belong to the oceanfront property owner whose land was initially eroded away by ocean waters or does the accretion belong to the landowner whose property became oceanfront as the result of the initial erosion? This raises the

50. See *supra* text accompanying note 39.

51. The demarcation between the ocean and the inlet is determined by the COLREGS (International Regulations Preventing Collisions at Sea). See Advisory Opinion, *supra* note 48, at 1 n.1.

52. PILKEY ET AL., *supra* note 6, at 40 ("As soon as an island forms, it immediately begins to migrate and change in its shape, vegetation, and land form. Different lands evolve in different ways and at different rates.").

issue of whether North Carolina follows the majority common law rule with respect to promotion of non-littoral land to the status of littoral land when the waterbody moves across the fixed boundary of the non-littoral land.

1. The Majority and Minority Rules

The majority common law rule is that once the waterbody moves across the fixed boundary of non-littoral land, that land is *promoted* to littoral status and the fixed boundary no longer exists.⁵³ From that moment forward, the waterbody forms the property line of the land. The owner of the promoted land benefits from all future accretions and suffers the same consequences of erosion as other littoral land owners.⁵⁴ A minority rule, followed by relatively few jurisdictions, is that non-littoral land remains non-littoral even after the waterbody has passed over a fixed boundary.⁵⁵ If accretion causes the re-emergence of land above the mean high water mark, the non-littoral owner may claim only that portion of the accretion that lies within her original fixed boundaries. All accretions beyond those boundaries belong to the original littoral owner, which means that the original littoral owner's title to such raised lands is restored.⁵⁶

2. The State of the Law in North Carolina

North Carolina law is not entirely clear on the issue of whether the majority or minority rule applies to oceanfront property. Application of the promotion rule is consistent with the reading of relevant statutes and sound policy. North Carolina General Statute section 77-20(a) sets the seaward boundary of "*all* property which . . . *adjoins the ocean*" as the mean high water mark.⁵⁷ When, through the process of erosion, ocean waters erode away ocean front property,

53. See GOULD, *supra* note 1, § 155, at 310–13.

54. See *id.*

55. See, e.g., *Ocean City Ass'n v. Shriver*, 46 A. 690, 694–95 (N.J. 1900) (adopting Lord Hale's rule that "if the land of the subject adjoining the same be swallowed up by the sea, and it be freely left again by the reflux and recess of the sea, the owner may have his land as before"); *Perry v. Erling*, 132 N.W.2d 889, 897 (N.D. 1965) (holding that upon promotion "the owner of the land that was originally nonriparian has title only to the accreted land within the boundaries of the formerly nonriparian tract," and that all other lands so accreted "extending over the area formerly occupied by the land of the original riparian owner, [belong to] the owner of the original riparian land.").

56. See 3 AMERICAN LAW OF PROPERTY § 15.27, at 858 n.7 (A. James Casner ed., 1952) (citing "[c]ases to the effect that such an originally nonriparian tract will not be enlarged beyond its original lines by either reliction or accretion, but that the added land will belong to the former owner from whom taken by erosion or submergence").

57. N.C. GEN. STAT. § 77-20(a) (2003) (emphasis added).

moving across, for example, the fixed rear boundary of the land and crossing the fixed boundary of the second row, non-littoral land lying behind it, then the formally non-littoral land would become "property which adjoins the ocean," the boundary of which would become the ambulatory mean high water mark. When any boundary of land is such an ambulatory boundary, that land is by definition littoral and subject to the erosion and accretion principles applicable to all littoral land.

In addition, application of the promotion rule is supported by the language of North Carolina General Statute section 146-6(a). Section 146-6(a) states that "if any land is, by any process of nature . . . raised above the high watermark of any navigable water, *title thereto shall vest in the owner of that land which, immediately prior to the raising of the land in question, directly adjoined the navigable water.*"⁵⁸ The import of the statute is that the owner of lands that at any moment in time abut ocean waters is a littoral owner and that the rules of accretion and erosion benefit or disadvantage that land and not land that may once have been littoral but through natural processes became submerged land.⁵⁹ Finally, application of the promotion rule allows oceanfront owners to make those investments typical of such owners without fear that their access to the ocean may be lost due to the waterward migration of the shoreline and the resurrection of submerged lands that, at some time in the past, were oceanfront uplands property.

The source of uncertainty and confusion as to the applicable rule in North Carolina is the 1971 opinion in *State v. Johnson*.⁶⁰ *Johnson* involved the effect of a moving inlet on the boundary line between two tracts of land.⁶¹ The two tracts of land had been separated by an inlet, but that inlet closed in 1933 and a boundary line was then fixed through an exchange of deeds between the owners of the tracts.⁶² A hurricane in 1944 suddenly opened a *new* inlet⁶³ north of the fixed

58. *Id.* § 146-6(a) (emphasis added).

59. The Office of the North Carolina Attorney General has the same interpretation of section 146-6(a). See Advisory Opinion, *supra* note 48, at 3.

60. 278 N.C. 126, 179 S.E.2d 371 (1971).

61. The case was part of eminent an domain proceeding brought by the State to acquire Fort Fisher and adjacent lands. *Id.* at 128–29, 179 S.E.2d at 373–74.

62. *Id.* at 132–33, 179 S.E.2d at 375–76, 385.

63. One issue in the case was whether the inlet was in fact a new one or simply a reopening of the old in a slightly different location. See Plaintiff-Appellee's Brief at 45, *State v. Johnson*, 278 N.C. 126, 179 S.E.2d 371 (1971) (No. 705SC653) ("It is submitted that the inlet which opened in 1944 is the same inlet which closed around 1933 even though it may not be in exactly the same location."). The plaintiff-appellee—the State of North Carolina—asserted that this 1944 "reopening" of the old inlet resurrected the

boundary.⁶⁴ Gradually that inlet migrated south, crossed the fixed boundary, and continued its southerly migration.⁶⁵ In 1968, the State commenced a condemnation action and a dispute arose over the ownership of a portion of the condemned land.⁶⁶ The owners of the northern tract of land claimed all the accreted land lying to the north of the new inlet, including the land to the south of the fixed boundary.⁶⁷ They asserted that once the inlet passed over the fixed boundary, the landowners became littoral land owners, subject to the common law rule of accretion and erosion, and the northern landowners were entitled to all accreted lands north of the inlet as of 1968.⁶⁸ The southern land owners argued that the movement of the inlet over the fixed boundary had no effect on the boundary between the two tracts and the boundary remained the original fixed line.⁶⁹ The *Johnson* court agreed with the southern land owners.⁷⁰ Creating a novel "traveling inlet" rule, the court held that the migration of a

original boundary between the two tracts, which was the inlet and not the fixed boundary line established after it closed in 1933. If that were correct, then the two tracts were once again riparian and the customary rules of accretion and erosion applied. As the inlet moved south, the land accreted to the north would belong to the plaintiff-appellee and the loss through erosion to the land to the south would be suffered by the defendant-appellant. *Id.* at 46-47, 50-52. The plaintiff-appellee also asserted that, even if the inlet was a new one, once it crossed the fixed boundary, the inlet and not the fixed boundary was the boundary line separating the two tracts and both became riparian. *Id.* at 50-53. In either event, the owners of the southern tract did not own any of the condemned land. *Id.* at 53.

64. *Johnson*, 278 N.C. at 133-34, 179 S.E.2d at 376.

65. *Id.* at 134, 147, 179 S.E.2d at 376, 385.

66. The northern boundary of the new inlet was also the southern boundary of the lands condemned. Therefore, the issue was who owned, and was entitled to compensation for, the lands between the fixed boundary and the inlet. *Id.* at 128-29, 179 S.E.2d at 373-74.

67. James E. Johnson, Jr., Albert S. Killingsworth, and Elizabeth E. Killingsworth owned the northern tract of land. *Id.* at 133, 179 S.E.2d at 375.

68. Defendant-Appellee's (Johnson) Brief at 17-18, 23-27, *Johnson* (No. 705SC653); Plaintiff-Appellee's Brief at 33-34, *Johnson* (No. 705SC653).

69. Defendant-Appellant's (Sherrill) Brief at 33, 48-49; *Johnson* (No. 705SC653). Frank O. Sherrill and his wife, Ruth J. Sherrill, owned the southern tract of land. *Johnson*, 278 N.C. at 128-29, 179 S.E.2d at 373.

70. *Johnson*, 278 N.C. at 148, 179 S.E.2d at 385 (holding "that the southern boundary of the . . . [northern tract] is at the point where the accretion from the north connected with the accretion from the south to close New Inlet in 1933"). New Inlet was actually the old inlet not the new inlet opened in 1944. However, in one of those twists of fate, the owners of the southern tract were determined not to have any claim of ownership to the disputed tract because they had failed to show that the land described in the deeds they offered as proof of their claim included the disputed land. *Id.* at 151-52, 179 S.E.2d at 387-88. The Supreme Court of North Carolina also concluded that the owners of the northern tract only owned the land north of the fixed boundary. *Id.* at 152, 179 S.E.2d at 388. So who owned the disputed land? That issue was never resolved!

“traveling inlet” does not affect boundary lines “unless such inlet in fact was the boundary when it started its journey.”⁷¹ Thus, *Johnson* appears to adopt the minority rule.⁷²

Johnson seems to be inconsistent with the Supreme Court of North Carolina’s 1970 decision in *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*.⁷³ Although the issue in *Carolina Beach* was title to land raised by filling, the language of the court is consistent with the promotion rule. In that case, the plaintiff’s lots had completely eroded away, being submerged for more than a year, and the mean high water mark had moved to the middle of the public street that at one time had run behind plaintiff’s lots.⁷⁴ When the town constructed a sand berm by dredging and hauling sand from a neighboring sound, placing that sand in the area in which plaintiff’s lots once stood, the plaintiff claimed the raised lands belonged to him.⁷⁵ However, the court rejected the claim stating that “[t]he owner of the riparian land . . . loses title to such portions as are so worn or washed away or encroached upon by the water.”⁷⁶ “Thus, twelve months before the berm was built, plaintiff’s lots had been taken by the sea and title thereto had vested in the State of North Carolina.”⁷⁷ The subsequent filling of the state-owned submerged lands in that area and the creation of the sand berm did not resurrect plaintiff’s divested title to the area.⁷⁸ The inference is that, as a matter of common law, plaintiff’s lots and his title to the area in which those lots once lay were lost forever.⁷⁹ In *Johnson*, however, the court

71. *Id.* at 148, 179 S.E.2d at 385.

72. The conclusion that the court is adopting the minority rule is based on the court’s statement of general principles and its conclusion that the “traveling inlet” did not “uproot and supplant” the fixed boundary that existed in the *Johnson* case. *Id.* However, the cases cited by the court are really not on point. See *infra* note 83.

73. 277 N.C. 297, 177 S.E.2d 513 (1970).

74. *Id.* at 299, 303, 177 S.E.2d at 514, 517.

75. *Id.* at 298–99, 177 S.E.2d at 514.

76. *Id.* at 304, 177 S.E.2d at 517 (quoting 56 AM. JUR. *Waters* § 477).

77. *Id.* at 303, 177 S.E.2d at 517.

78. *Id.* at 303, 177 S.E.2d at 516.

79. The North Carolina Attorney General’s position is that North Carolina follows the majority common law promotion rule. See Advisory Opinion, *supra* note 48, at 2.

The qualification “as a matter of common law” is necessary because as a matter of statutory law and state regulations, a riparian owner *may* be able to obtain a permit to recover “lands . . . lost to the owner by natural causes.” N.C. GEN. STAT. § 146-6(b) (2003). However, the right to do so extends only to an “owner of land adjoining any navigable water.” *Id.* § 146-6(c). But the statutory interpretation question is whether someone whose lands have completely eroded away is still the owner of any “land adjoining a navigable water.” The North Carolina Coastal Area Management rules do allow owners of estuarine shoreline to recover lands lost in the previous year from the time the owner applied for permission to build a bulkhead. N.C. ADMIN. CODE tit. 15A, r.

limited the application of *Carolina Beach* to situations in which the body of water was part of the legal description of the boundaries of the land.⁸⁰ When the boundary is a fixed boundary, the *Johnson* court stated that the rules of accretion and erosion do not affect the location of the boundary.⁸¹

But, *Johnson*, arguably, was incorrectly decided, and, at best, applicable only to “traveling inlets” which are not also part of the boundary separating tracts of land. The *Johnson* court failed to consider the relevance of section 146-6(a) to the facts, and the holding appears to be directly contrary to that section’s language.⁸² Once the inlet crossed the fixed boundary, both property owners would have been separated by a waterbody; section 146-6(a) establishes the rule that land raised by any process of nature belongs to the owner of the land that, prior to the raising, directly adjoined the navigable water—in this case, a navigable inlet. In addition, the court cited no authority for its “traveling inlet” rule and the authority it did cite has nothing to do with the issue of promotion.⁸³ Finally, application of the minority

7H.0208(b)(7)(D) (May 1996), available at http://www.nccoastalmanagement.net/Rules/Text/t15a_07h.pdf (on file with the North Carolina Law Review). But this rule only applies when there is an identifiable erosion problem. *Id.*

80. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371, 385 (1971).

81. *Id.*

82. Section 146-6(a) was enacted in 1959, twelve years prior to the *Johnson* decision. See Act of Jun. 2, 1959, ch. 683, § 1, 1959 N.C. Sess. Laws 612, 614 (codified at N.C. GEN. STAT. § 146-6(a) (2003)). None of the briefs submitted by the parties in *Johnson* raised section 146-6(a). Interestingly, just one year earlier, subsections 146-6(b) and (c) were discussed in the court’s 1970 *Carolina Beach* opinion. 277 N.C. at 304, 177 S.E.2d at 517. Section 146-6(b) vests title to land reclaimed by filling when the purpose of the filling is to reclaim lands lost to the littoral owner by natural causes. The *Carolina Beach* court determined that this subsection was not applicable because the Carolina Beach project was undertaken for “the preservation and protection of the Town of Carolina Beach from the fury of the sea rather than the reclamation of the lands of private owners along the beach.” *Id.*

83. In its opinion, the *Johnson* court states that “[o]ur position is supported by cases from other jurisdictions.” 278 N.C. at 148, 179 S.E.2d at 385. But, in fact, the cases cited by the *Johnson* court not only have nothing to do with inlets but do not even involve the issue of whether non-riparian land becomes riparian when a waterbody crosses a fixed boundary. Nor do the cases address the question of whether a riparian parcel that is completely eroded away may be resurrected by through accretion.

The treatises cited by the *Johnson* court do provide some support for its conclusion. For example, HERBERT TIFFANY, 4 TIFFANY ON REAL PROPERTY § 1220 (3d ed. 1975), discusses whether the doctrine of accretion is a rule of law or a rule of construction. In the discussion, the promotion rule is viewed as supporting the concept that the accretion doctrine is a rule of law; whereas the non-promotion rule is consistent with the view that the doctrine is a rule for the determination of boundaries. *Id.* From that one might draw the conclusion that the common law doctrine of accretion is a rule of construction in North Carolina.

rule to oceanfront property would be directly contrary to the language of section 77-20(a).

The only other North Carolina case in which a claim was made by an owner of lands washed away then subsequently raised is *Ward v. Sunset Beach & Twin Lakes, Inc.*⁸⁴ In *Ward*, the migration of an inlet resulted in a number of lots in a barrier island development completely eroding away.⁸⁵ Two of the lost lots were beach lots, located at the mouth of Tubbs Inlet on the east end of Sunset Beach, North Carolina.⁸⁶ The lots had been purchased by the plaintiff and her husband in 1955 and left undeveloped.⁸⁷ Over the next twelve years, the inlet shifted to the west and the entire east end of the development, including plaintiff's lots, were submerged and eroded away.⁸⁸ No attempt was made by plaintiff or her husband to recover the eroded land, but in 1968 the enterprising original developer of the area obtained permits to relocate the inlet to the east.⁸⁹ As part of the relocation of the inlet, the area between was filled.⁹⁰ After completing the filling, the configuration of the area was significantly different than in 1955.⁹¹ The developer had the area re-surveyed, and recorded a new plat map, creating new lots with boundaries different from the original lots.⁹² The new plat also placed streets and roads in new locations.⁹³

Later, when the plaintiff discovered what had occurred, she filed suit asserting both title to the raised land in the area defined by her deed and easement rights over the area shown as roads in the original plat.⁹⁴ The trial court found that the plaintiff owned the lots as described in her original deed.⁹⁵ Plaintiff's title to the reclaimed lots was not predicated on the application of any common law rules, but on North Carolina General Statute section 146-6(b). The trial court

84. 53 N.C. App. 59, 279 S.E.2d 889 (1981).

85. *Id.* at 60, 279 S.E.2d at 890.

86. *Id.*; Brunswick County, North Carolina, Office of the Register of Deeds, Map Book 4 at 64-65, available at <http://rodinfo.brunsko.net/> (last visited July 20, 2005) (on file with the North Carolina Law Review).

87. *Ward*, 53 N.C. App. at 60, 279 S.E.2d at 890.

88. *Id.*

89. *Id.* at 60, 279 S.E.2d at 891.

90. *Id.*

91. *Id.* at 61, 279 S.E.2d at 891.

92. *Id.*; Map Book H at 358, Office of the Register of Deeds, Brunswick County, North Carolina, available at <http://rodinfo.brunsko.net/> (last visited July 20, 2005) (on file with the North Carolina Law Review).

93. *Ward*, 53 N.C. App. at 61, 279 S.E.2d at 891.

94. *Id.* at 59-60, 279 S.E.2d at 890.

95. *Id.* at 62, 279 S.E.2d at 891-92.

appeared to have found that the filling was done by the defendant to recover lands lost to the plaintiff.⁹⁶ In such circumstances, section 146-6(b) vests title in the property owner whose land was reclaimed.⁹⁷

On appeal, the defendant did not contest the trial court's finding of fact as to ownership.⁹⁸ The probable reason for this is that the reclaimed area in which "her" lots were located was seaward of the building setback lines, therefore unbuildable,⁹⁹ and within parts of four undeveloped lots title to which was still held by the developer.¹⁰⁰ What the defendant did contest was the plaintiff's claim of an easement. The plaintiff asserted that her title to the lots included an easement, in this case the right to use the area shown on the original plat as Main Street, the street on which her lots fronted.¹⁰¹ This street, of course, no longer existed in that location. But if its location was superimposed on the new development plat, the street would run directly through the middle of a number of the new lots, which had been sold and upon which were very expensive beach homes.¹⁰² The defendant argued that the easement, and whatever rights of use the plaintiff had to Main Street, were lost when the land was washed away.¹⁰³ Unfortunately for the defendant and the title companies representing the owners of the new lots, the *Ward* court held that the plaintiff never abandoned her easement rights and her rights were not extinguished.¹⁰⁴ Once her land was reclaimed she had fee title to that land, which included her easement appurtenant.¹⁰⁵

To the extent that *Ward* suggests that plaintiff's title to the lots was not affected by the erosion as the inlet moved across the east end

96. See Defendant-Appellee's Brief at 3, *Ward* (No. 8013DC757).

97. See N.C. GEN. STAT. § 146-6(b) (2003) ("If any land is, by act of man, raised above the high water mark of any navigable water by filling, except such filling be to reclaim lands theretofore lost to the owner by natural causes or as otherwise provided under the proviso of subsection (d), title thereto shall vest in the State . . .").

98. The defendant conceded plaintiff's title on the basis that the filling was done to recover her lost lands and, under such circumstances, section 146-6(b) vested title to the lots in her. Defendant-Appellee's Brief at 3, *Ward* (No. 8013DC757).

99. *Driveway to Vacant Lots Could Cost \$14 Million*, CHAPEL HILL NEWSPAPER, June 25, 1985, at 8B [hereinafter *Driveway to Vacant Lots*] ("Wards' land is beyond the island's building line and is good only for dunes and sand crabs.").

100. Record on Appeal at 12, *Ward* (No. 8013DC757) (detailing the testimony of surveyor Howard Loughlin).

101. Plaintiff-Appellant's Brief at 2, *Ward* (No. 8013DC757).

102. *Driveway to Vacant Lots*, *supra* note 99 ("The driveway would have to go across seventy-six other front-row lots, and slice through beach houses costing as much as \$250,000.").

103. *Ward v. Sunset Beach & Twin Lakes, Inc.*, 53 N.C. App. 59, 63, 279 S.E.2d 889, 892 (1981).

104. *Id.* at 66, 279 S.E.2d at 894.

105. *Id.*

of Sunset Beach, that is clearly inconsistent with *Carolina Beach* and is wrong. One boundary of plaintiff's lots was the inlet, an ambulatory boundary. Application of the *Carolina Beach* principles leads to the conclusion that when her lots disappeared under the waters of the inlet so did her title. The "traveling inlet" rule would have no application to her lots. Even the *Johnson* court conceded that a traveling inlet does uproot and supplant a boundary line when the inlet is in fact the pre-migration boundary.¹⁰⁶

Assuming that the Supreme Court of North Carolina would still adhere to this "traveling inlet rule," the rule should only be applicable to the narrow situation in which there is an inlet, the inlet is not the boundary between two tracts of land, and the inlet subsequently passes over the fixed boundary separating the two tracts of land. However, it would be better to jettison this legal anomaly. The "traveling inlet" rule is inconsistent with the intent of North Carolina General Statute sections 77-20(a) and 146-6(a), and the source of unnecessary potential litigation over areas raised through accretion, avulsion, or filling. Simple, uniform, bright-line rules are what is called for in the coastal setting. Even if the land does not start out as littoral—if through natural processes it abuts the ocean or an inlet—it should be considered littoral and treated the same as land that always had an ambulatory water boundary.

IV. ARTIFICIAL ADDITIONS TO THE SHORELINE: THE EFFECT OF PRIVATE OR PUBLIC BEACH NOURISHMENT OR SAND PLACEMENT PROJECTS ON TITLE AND LITTORAL RIGHTS

Artificial additions of sand to the shoreline fall within two general project descriptions. The project may be a sand placement project,¹⁰⁷ which, in most situations, is a one-time placement of sand

106. See *State v. Johnson*, 278 N.C. 126, 148, 179 S.E.2d 371, 385 (1971).

107. Such projects, if funds are available, may be authorized under one of several different laws. Section 111 of the Rivers and Harbors Act of 1968 authorizes the United States Army Corps of Engineers to take corrective measures for erosion and adjacent damage to shorelines that result from a federal navigation project. Rivers and Harbors Act of 1968 § 111 (codified at 33 U.S.C. § 426i (2000)). The Corps is also authorized to place sand dredged from navigational channels and inlets onto adjacent beaches if the state or one of its political subdivisions pays thirty-five percent of the additional costs of placing the sand on the beach. See 33 U.S.C. § 426j (2000). Section 1135 of the Water Resources Development Act of 1986 grants the Corps authority to restore habitat if the habitat is affected by a Corps project. See Water Resources Development Act of 1986 § 1135 (codified at 33 U.S.C. § 2309a(c) (2000)). The local sponsor contributes twenty-five percent of the cost of the project. 33 U.S.C. § 2309a(d). Land, easements, rights-of-way, and in-kind products and services are counted in the cost-share. U.S. ARMY CORPS OF ENGINEERS, DIGEST OF WATER RESOURCES POLICIES AND AUTHORITIES, ENGINEER

along the shoreline,¹⁰⁸ or it may be a full fledged, fifty-year, federal-state, site-specific, beach nourishment project.¹⁰⁹ Since the legal issues are generally the same for either type of project, the term “beach project” will be used in this Article to refer to both, except where a distinction is necessary.

When, as part of a beach project, submerged land is filled and raised above the mean high tide line, two issues are immediately presented. First, does the State or the adjacent oceanfront property owner hold title to the raised submerged land? Second, what effect, if any, does the filling and rising of submerged land have upon the littoral rights of the oceanfront property owner?

A. *Privately Funded Beach Nourishment Projects*

Beach projects are either privately funded or publicly funded. Privately funded beach nourishment projects face both legal and practical difficulties. All beach projects involve the filling and raising of state-owned, submerged public trust land above the mean high

PAMPHLET 1165-2-1 ¶ 14-1(c) (1999) [hereinafter ENGINEER PAMPHLET], available at <http://www.usace.army.mil/inet/usace-docs/eng-pamphlets/ep1165-2-1/entire.pdf> (on file with the North Carolina Law Review).

108. The Oak Island Sea Turtle Project, discussed *infra* notes 171–75 and accompanying text, was a one-time sand placement. See Christine Bruske, *Corps Gives Turtles a Fighting Chance*, ENGINEER UPDATE, Dec. 2001, available at <http://www.hq.usace.army.mil/cepa/pubs/dec01/story11.htm> (on file with the North Carolina Law Review).

109. Authorization for site-specific beach nourishment projects is provided by Congress on a project-by-project basis. See, e.g., NAT’L RESEARCH COUNCIL, COMM. ON BEACH NOURISHMENT AND PROTECTION, BEACH NOURISHMENT AND PROTECTION 43–45 (1995) [hereinafter BEACH NOURISHMENT AND PROTECTION] (discussing funding of beach nourishment). It is not uncommon for people to use the term “beach nourishment” for sand placement projects. But there are major differences in the two types of projects. It takes ten to fifteen years of extensive studies to obtain the necessary federal share of the funding before the first grain of sand is deposited on the shoreline as part of a fifty-year federal beach nourishment project. See, e.g., PILKEY & DIXON, *supra* note 29, at 10–11 (1996) (discussing the process to complete a project). Once the first nourishment is completed, there will be additional sand replenishment approximately every five years over the full 50 year cycle of the project. For a detailed description of the federal beach nourishment process, see, for example, ATLANTIC STATES MARINE FISHERIES COMM’N, BEACH NOURISHMENT: A REVIEW OF THE BIOLOGICAL AND PHYSICAL IMPACTS, ASMFC HABITAT MANAGEMENT SERIES No. 7, 70–76 (2002), available at <http://www.asmfc.org/publications/habitat/beachNourishment.pdf> (on file with the North Carolina Law Review). A sand placement project does not involve the same extensive pre-project studies and generally is a one-time deposit of sand along the shoreline. See generally BEACH NOURISHMENT AND PROTECTION, *supra*, at 60 (distinguishing sand placement from the intensive beach nourishment process). Since the legal issues presented by either project are the same, the term “beach project” will be used to describe both in this Article except where a distinction is significant.

water mark. Neither littoral owners nor anyone else has a common law right to fill state-owned public trust lands.¹¹⁰ What right, if any, that exists is a matter of state legislation. North Carolina statutes allow oceanfront property owners, after obtaining permission, to fill and raise such state-owned lands.¹¹¹ If the applicant is seeking to reclaim lands lost through natural causes, then no state easement is required.¹¹² But if the applicant is not seeking to reclaim lands lost to him or her through natural causes, then an easement is required.¹¹³ Such an easement will be granted if the Department of Administration determines that the fill “will not impede navigation or otherwise interfere with the use of the navigable water by the public or injure any adjoining . . . [littoral] owner”¹¹⁴ and appropriate compensation is paid for the easement.¹¹⁵ Before commencing any filling, an applicant must also obtain a Coastal Area Management Act (CAMA) permit.¹¹⁶ The applicable CAMA provisions require that, before a permit is issued, a finding be made that the filling will not jeopardize the public’s right of access or public trust rights or interests.¹¹⁷ Finally, since any filling will also be taking place in ocean waters, which are part of the “navigable waters of the United

110. See generally 1 WATERS AND WATER RIGHTS, *supra* note 1, § 6.01(a)(7), at 6-51 to -61 (discussing common law, statutory authorizations, and history of regulation of filling of submerged lands in navigable waters).

111. N.C. GEN. STAT. § 146-6(c) (2003).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. The North Carolina Coastal Area Management Act (CAMA) requires a permit for any development in areas of environmental concern. *Id.* § 113A-118(a) (2003). Ocean and estuarine beaches are areas of environmental concern. N.C. ADMIN. CODE tit. 15A, r. 7H.0201 (Aug. 2000) (listing estuarine and ocean systems categories), *available at* http://www.nccoastalmanagement.net/Rules/Text/t15a_07h.pdf (on file with the North Carolina Law Review); *id.* r. 7H.0207 (Oct. 1993) (stating that ocean submerged lands seaward of mean high water mark are public trust areas).

117. In North Carolina, the dry sand beach and the area seaward of the mean high water mark are “areas of environmental concern.” See N.C. GEN. STAT. § 113A-113(b)(5)–(6); see also N.C. ADMIN. CODE tit. 15A, r. 7H.0201 (Aug. 2000) (listing estuarine and ocean systems categories); *id.* r. 7H.0207 (Oct. 1993) (stating that ocean submerged lands seaward of mean high water mark are public trust areas). The applicable standards for permits for a major development in such an area of environmental concern (an AEC) which would include filling and raising of public trust submerged lands above the mean high water mark, require that the application for the permit be denied if “the development will jeopardize” public rights or interests, N.C. GEN. STAT. § 113A-120(a)(5), or “is inconsistent with . . . [CAMA] guidelines or local land use plans,” *id.* § 113A-120(a)(8). See also N.C. ADMIN. CODE tit. 15A, r. 7H.0208(b)(8) (May 1996) (listing beach nourishment standards); *id.* r. 7H.0308(a) (Aug. 2002) (listing criteria for ocean shoreline erosion control activities).

States,”¹¹⁸ a permit must be obtained from the U.S. Army Corps of Engineers,¹¹⁹ a process that requires that the Corps conduct an extensive public interest review.¹²⁰ Satisfaction of the various permit conditions is the first impediment faced by a private beach project. The second is the costs, both legal and otherwise, of the project itself. Beach projects generally require costly and extensive engineering and environmental studies in addition to the costs of the actual filling.¹²¹ It is probably the costs of the project more than the legal hurdles that discourage privately funded projects and lead to the demand for publicly funded beach projects.

When such privately funded projects are permitted,¹²² the filling and raising of submerged lands has no effect on the title or the littoral

118. 33 C.F.R. § 329.4 (2004) (defining “[n]avigable waters of the United States” to include waters subject to ebb and flow of tide); *see also id.* § 329.12 (stating that navigable waters of the United States includes ocean and coastal waters). Section 502(7) of the Clean Water Act defines “navigable waters” to include the territorial seas. 33 U.S.C. § 1362(7) (2000).

119. Section 10 of the Rivers and Harbors Appropriation Act of 1899 makes it unlawful to excavate or fill any navigable water of the United States except when authorized by the United States Army Corps of Engineers. 33 U.S.C. § 403. Section 301 of the Clean Water Act prohibits the discharge of any pollutant into waters of the United States, which includes the territorial seas. *See id.* §§ 1311, 1362(7). Section 404(a) grants the Corps the authority to issue permits for the discharge of dredge or fill material into navigable waters. *See id.* § 1344.

120. The general policies for the issuance of Corps permits, including the public interest review, can be found at 33 C.F.R. § 320.4.

121. Although the cost per mile varies with each project, illustrative are a series of long-term beach projects that were under construction or being studied in 2001. Brunswick County (Oak Island, Casewell, Ocean Isle, and Holden Beach): twenty-three miles of beach at a cost of \$201 million over thirty years; Topsail Island (study of fifty-year plan): 22.7 miles of beach at a cost of \$235 million; Bogue Banks (study of a fifty-year plan): seventeen miles of beach from Pine Knoll Shores to Emerald Isle at a cost of \$289 million. *See Frank Tursi, Call of the Beach*, WINSTON-SALEM J., Mar. 11, 2001, at A1. A fifty-year project recommended by the Army Corps of Engineers to pump sand on the beaches in Kitty Hawk, Kill Devil Hills, and Nags Head would cost \$910 million, or about \$1.3 million a mile each year. *Id.* This project when adjusted for 50 years of inflation jumps to \$1.6 billion. *Id.* The one time, two mile turtle habitat beach nourishment project on Oak Island in 2001 cost \$11.4 million. Jerry Allegood, *Fortifying a Nursery for Island's Sea Turtles*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 28, 2001, at 1A. The expected life of this project is ten to fifteen years. Bruske, *supra* note 108. This is the project that generated the *Slavin* litigation. *See infra* Part IV.B.3.

122. For example, Figure Eight Island has a private bridge out to the island that the public is not allowed to use. Brian Feagans, *As Seas Rise, N.C. Islanders Face Simple Choice: Retreat or Renourish*, SUNDAY STAR NEWS (Wilmington, N.C.), Jan. 2, 2000, at 1A. As a result, Figure Eight Island does not qualify for taxpayer money to fund beach renourishment projects. *Id.* The residents raised eight million dollars of their own money to fund nourishment projects, and the island has been allowed to pump modest amounts of sand from nearby channels, inlets, and spoil islands, but beach quality sand has been hard to find. *Id.*

rights of the oceanfront property owner. Under the applicable North Carolina statute, the oceanfront property owner would hold title to the newly raised shore to the mean high water mark.¹²³ Such title, as all private titles to the dry sand beach, remain subject to public trust rights.¹²⁴ Since the oceanfront owner would have title to the water's edge, exactly as before the beach nourishment, the project would have no effect on any littoral rights that previously existed.

B. Publicly Funded Beach Projects

1. Public Use and Title

The bulk of the funds for most public beach projects is federal.¹²⁵ Whether public access to the nourished beach is a requirement for federal financial participation depends on the project's classification. If it is the typical long-term project, the primary purpose of which is the reduction of hurricane and storm damage to shore development and coastal resources,¹²⁶ the nourished beach must be open to public use.¹²⁷ These federal requirements do not mandate public ownership of the replenished beach—only that it be open to the public. But

123. Section 146-6 addresses the title questions that would arise in most beach nourishment projects. See N.C. GEN. STAT. § 146-6(b) (2003). If the purpose of the project is to reclaim lands lost to the applicant as the result of natural causes, then title to the raised land is vested in the applicant. If the project is not for that purpose, title is still vested in the applicant if the land was raised under permits issued to a private person pursuant to sections 113-229 and 113A-100 to -128. The latter North Carolina permitting statutes cover most of, if not all, of the circumstances in which a privately funded beach nourishment project would be authorized.

124. *Id.* § 146-6(f) ("All such raised lands shall remain open to the free use and enjoyment of the people of the State, consistent with the public trust rights in ocean beaches . . .").

125. See Stradling, *supra* note 8 ("Local, state and federal taxpayers split the bill for nourishment projects, with the federal government paying about half the cost of the studies and about two-thirds the cost of construction.").

126. See U.S. ARMY CORPS OF ENGINEERS, FINAL REPORT: AN ANALYSIS OF THE U.S. ARMY CORPS OF ENGINEERS SHORE PROTECTION PROGRAM, IWR Report 96-PS-1, at III-24-25 (1996) ("The enactment of WRDA '86 [Water Resources Development Act of 1986] established hurricane and storm damage reduction (HSDR) and recreation as the basis for Federal participation, and the only two purposes for which Federal shore protection projects could be formulated."), available at <http://www.usace.army.mil/iwr/pdf96psl.pdf> (on file with the North Carolina Law Review).

127. As a general matter, federal funds may not be used to nourish privately-owned and used shorelines. The Water Resources Development Act of 1986, as amended in 1999, in a section titled "Benefits to privately owned shores," provides that "[a]ll costs assigned to benefits of periodic nourishment projects or measures to privately owned shores (where use of such shores is limited to private interests) or to prevention of losses of private land shall be borne by the non-Federal interest." 33 U.S.C. § 2213(d)(2)(B) (2000); see also ENGINEER PAMPHLET, *supra* note 107, ¶ 14-1(c)(2)(a)–(b).

North Carolina General Statute section 146-6(f) provides that “the title to land in or immediately along the Atlantic Ocean raised above the mean high water mark by *publicly financed projects* which involve *hydraulic dredging or other deposition of spoil materials or sand* vests in the state.”¹²⁸ Therefore, if the nourishment is publicly funded and involves raising ocean submerged lands, then the state, not the oceanfront property owner, holds title to the nourished beach.

On the other hand, if the federally funded beach project is part of a federal corrective and mitigation project, federal law does not require that the restored beach be open to use by the public. This is one of the rare instances in which federal funds will be expended to place sand on privately owned and controlled beaches. If erosion is caused by artificially created conditions, the oceanfront property owner has a common law claim for damages against the person responsible for the condition.¹²⁹ Although the federal navigation servitude protects the federal government from liability for some of

128. N.C. GEN. STAT. § 146-6(f) (emphasis added). CAMA regulations applicable to beach nourishment projects go even further. The regulations condition state involvement in beach projects. The applicable regulations require that “[t]he *entire* restored portion of the beach shall be in permanent public ownership.” N.C. ADMIN. CODE tit. 15A, r. 7M.0202(d)(1) (May 1995) (emphasis added), *available at* <http://www.nccoastalmanagement.net/Rules/Text/t15a-07m.0200.pdf> (on file with the North Carolina Law Review). However, some local governments may only be requiring oceanfront property owners to execute documents that convey an easement to the local entity for public use of the replenished beach. In one document, it appeared that oceanfront property attempted to create an easement that was revocable if the beach was not replenished on a regular, continuing basis. The document is entitled “Perpetual Easement For Beach Renourishment,” and executed in connection with a beach nourishment project on the beaches of the Town of Kure Beach, North Carolina. Typed on the document, by the oceanfront property owner executing it, are the following words:

This easement shall expire six years from the date the execution was acknowledged before a Notary Public unless the grantee its successors and assigns have engaged in the deposit of sand on the easement as part of the above referenced “Carolina Beach and Vicinity Area South, Hurricane, wave, and Shore Protection Project” and shall expire automatically if there is any six year period in which sand is not deposited as part of this project or a comparable project sponsored in whole or in part by the Town of Kure Beach.

Kalo, *supra* note 6, at 1891 n.98 (quoting Perpetual Easement For Beach Renourishment, New Hanover County, N.C., Dec. 30, 1995). Such easements, however broad or limited, are inconsistent with the clear directive of section 146-6(f) and the applicable CAMA regulation that title to replenished beaches is in the state, and become public trust lands. Failure to make this clear to oceanfront property owners only causes confusion as to the extent of public rights to the beach and may be the source of unnecessary future litigation.

129. See, e.g., *Lummis v. Lilly*, 429 N.E.2d 1146, 1149–50 (Mass. 1982) (upholding a claim for shoreline damage caused by a neighboring stone groin on the theory that the appropriateness of the use of shoreline protection measures depends on whether it is a “reasonable use” by the owner of the groin).

the adverse consequences of its navigation projects, under existing case law the federal government arguably is liable for increased beach erosion caused by federal navigation structures.¹³⁰ Thus, the federal mitigation project is a form of compensation to the affected oceanfront property owner. But, the language of section 146-6(f) draws no distinction between types of beach projects. The crucial factor is the presence of public financing. If any public funds are used, then the raised land is state-owned.¹³¹ But, if the federal project was compensatory in nature, the presence of public funds should have no effect on the oceanfront property owner's claim of title to the raised land. The "public funds" are really a form of compensation to the oceanfront property owner who suffered the adverse effects of a particular federal navigation project. Consequently, this situation should be treated the same as section 146-6(f) treats a directly privately funded beach project.¹³²

Interestingly, shoreline additions to inlet front property are treated differently than those along the Atlantic Ocean. If the beach project involves the placement of material along inlet shorelines, then sections 146-6(b) and 146-6(d)—and not section 146-6(f)—are the relevant provisions.¹³³ When additions are to inlet shorelines, the

130. In *Applegate v. United States*, the United States Court of Federal Claims held that oceanfront property owners, who alleged in their complaint that federal navigation structures interfered with the natural movement of sand in the adjacent ocean littoral currents and thereby increased the rate of erosion of their oceanfront property, stated a legally cognizable claim under the Federal Tort Claims Act. 35 Fed. Cl. 406, 410–11, 425 (Fed Cl. 1996).

131. See N.C. GEN. STAT. § 146-6(f) (2003).

132. If the federal government is liable for the loss of the land by reason of the action of federal navigation structures, and the filling is being done, as it would be in such a compensatory project, to "reclaim lands theretofore lost to the owner by natural causes or otherwise," *id.* § 146-6(b) (emphasis added), then title to the sand placed on the beach by the federal government should be in the oceanfront property owner. In reality, when the project is compensatory in nature, the federal government is acting on behalf of the oceanfront property owner. If the State claims title to the raised land, then the State is physically taking land belonging to the oceanfront property owner in violation of both the Fifth Amendment to the United States Constitution and article I, section 19 of the Constitution of the State of North Carolina. What the measure of damages should be may be debatable. The cost of the project is some measure of the loss sustained by the oceanfront property owner; but, since all dry sand beaches are open to public use, part of the cost of the project is compensation to the public for the loss of the dry sand beach. However, that does not mean that the oceanfront property owner sustains no loss. Even though title to a dry sand beach is always encumbered by public trust rights, the lack of title to a nourished beach means the oceanfront property owner is no longer a common law littoral owner. What rights the oceanfront owner now possess are a matter of statute not common law.

133. Section 146-6(f) applies only to land "in or immediately along the Atlantic Ocean." *Id.* § 146-6(f). See also Advisory Opinion, *supra* note 48 (stating subsection 146-

presence or absence of public funding is not the critical factor in determining whether title vests in the state. Under section 146-6(b) the critical factor is whether the purpose of the project was to recover lands lost to the owner.¹³⁴ If it is, title remains in the inlet front owner; if not, then subject to one exception discussed below,¹³⁵ title to the raised land is in the state. In the context of a publicly funded beach project, recovery of lands lost to inlet front property owners is not one of the purposes. Instead, the purposes are to provide hurricane and storm protection to upland areas and to restore the recreational beach.¹³⁶ Therefore, as a practical matter, section 146-6(b)'s treatment of publicly funded inlet beach projects is the same as section 146-6(f).¹³⁷ The exception is contained in section 146-6(d). Under section 146-6(d), the source of the material is determinative, not the source of funding or the purpose of the project.¹³⁸ If the raising of submerged land involves any deposit of dredge material excavated for the purpose of deepening a harbor or inland waterway, or clearing out or creating the same, on privately-owned land, then the material deposited belongs to the owner of the land upon which it was deposited and not the state.¹³⁹

6(f) is inapplicable because inlet channel shoreline is not " 'immediately along the Atlantic Ocean' " (internal citation omitted).

134. The section states: "If any land is, by act of man, raised above the high watermark of any navigable water by filling, *except such filling be to reclaim lands theretofore lost to the owner by natural causes*, . . . title thereto shall vest in the State . . ." *Id.* § 146-6(b) (emphasis added).

135. *See infra* notes 138-40 and accompanying text.

136. *See supra* note 126 and accompanying text.

137. *See infra* note 224.

138. *See* Advisory Opinion, *supra* note 48. Section 146-6(d) is not applicable to lands in or along the Atlantic Ocean because section 146-6(f) applies to such lands "[n]otwithstanding the other provisions of [section 146]." § 146-6(f).

139. The statute provides, in part:

[I]f in any process of dredging, by either the State or federal government, for the purpose of deepening any harbor or inland waterway, or clearing out or creating the same, a deposit of the excavated material is made upon the lands of any owner, and title to which at the time is not vested in either the State or federal government, or any other person, . . . all such additions to lands shall accrue to the use and benefit of the owner or owners of the land or lands on which such deposit shall have been made, and such owner or owners shall be deemed vested in fee simple with the title to the same.

§ 146-6(d). If the deposit of the material was not dredge material, but sand obtained from other sources or from other purposes, then section 146-6(d) would not apply. The applicable provision would be section 146-6(b). This section provides that, unless the purpose of the filling is to recover lands lost to the owner by natural causes, title to the raised land vests in the state. Whether the project is publicly or privately funded is not a relevant factor. *Id.* § 146-6(b). The purpose of the filling is the determining factor. *See id.*

2. Beach Projects and the Loss of Littoral Rights

If title to a publicly nourished beach lies in the state or other public authority, then what effect does that have upon the common law littoral rights of the oceanfront property owner? If after the project the property's direct contact with ocean waters is lost, then the owner of this "oceanfront property" no longer has any common law littoral rights.¹⁴⁰ Unless—as part of the beach project—the oceanfront property owner has ceded her littoral rights, those rights have been replaced by equivalent statutory rights, or the existence of those rights was inherently contingent upon the adjacent submerged lands remaining unfilled, the oceanfront property owner may be entitled to compensation for the loss.

Realistically, in most situations in which a beach is seriously eroded or eroding, faced with the choice of either giving up common law littoral rights or not having a beach project for the protection of oceanfront structures, most oceanfront property owners will make the necessary concessions.¹⁴¹ The beach project will have little adverse effect on their customary use of the shore. After *most* beach projects, oceanfront property owners will still be able to walk down to the beach and into ocean waters, to lie on the dry sand, or to sit on a deck or at a window and watch the waves move toward the shore. Even when an oceanfront property owner refuses to make the necessary concessions, if the project has no significant impact on their use of their property or the shore, there may be a technical taking of littoral rights, but the taking would have little practical effect and any compensation due would not seem substantial. It is only when a project does adversely impact oceanfront property owners and littoral

The fact that project was publicly funded, however, would still be relevant to whether federal regulations mandate that there be public access to the raised lands. *See id.*

Section 146-6(d) is not applicable to oceanfront beach projects. Section 146-6(d) was included in section 146 as part of the revision of the North Carolina General Statutes. Act of June 2, 1959, ch. 683, 1959 N.C. Sess. Laws 612, 615 (codified at N.C. GEN. STAT. § 146-6(d) (2003)). Section 146-6(f), which addresses all publicly funded oceanfront beach projects, however, was enacted by the legislation in 1985. Act of May 30, 1985, ch. 276, 1985 N.C. Sess. Laws 226, 226-27 (codified at N.C. GEN. STAT. § 146-6(f) (2003)). To the extent there is a conflict between sections 146-6(d) and (f), as the later enactment, section 146-6(f) is controlling. *See, e.g., In re Guess*, 324 N.C. 105, 107, 376 S.E.2d 8, 10 (1989) (holding where irreconcilable conflict exists, the later statute generally controls).

140. To have common law littoral rights, one boundary of the subject land must be the ocean or an inlet. By statute, the State could grant littoral rights to non-littoral owners and has done so in the past in connection with a beach nourishment project. *See infra* notes 148-54 and accompanying text.

141. Although one does occasionally hear stories about property owners holding out and refusing to execute documents necessary for a project.

rights are not voluntarily relinquished that a serious issue arises as to whether the oceanfront property owner has lost any littoral rights for which compensation must be paid.

a. Does North Carolina General Statutes Section 146-1(d) Preserve Existing Littoral Rights?

It is true that section 146-6(f) of the General Statutes of North Carolina places the title to a beach created by a publicly funded beach nourishment project in the state, subject to public trust use rights;¹⁴² however, section 146-6(f) does not address the consequences of such filling on the oceanfront property owner's littoral rights. But, section 146-6(f) is found in "Subchapter I: Unallocated State Lands." The first section of that subchapter, section 146-1—entitled "Intent of Subchapter"—provides in part (d): "[n]othing in this Subchapter shall be construed to limit or expand the full exercise of common law riparian or littoral rights."¹⁴³ Therefore an appropriate construction of section 146-6(f) is that, although it grants title to raised lands to the state, the statute is not intended to impair pre-existing littoral rights.¹⁴⁴

Part (d) of section 146-1 was added in 1995 as part of legislation, the major purpose of which was to address the use and occupancy of submerged lands by marinas and other private facilities and structures.¹⁴⁵ There is no indication that the General Assembly

142. The statute states, in pertinent part:

[T]itle to land in or immediately along the Atlantic Ocean raised above the mean high water mark by publicly financed projects which involve hydraulic dredging or other deposition of spoil materials or sand vests in the State All such raised lands shall remain open to the free use and enjoyment of the people of the State, consistent with the public trust rights in ocean beaches

§ 146-6(f).

143. *Id.* § 146-1(d).

144. The point being asserted is equally applicable to section 146-6(b) when submerged land along an inlet shoreline is filled and the claim is made that the State both holds title to the raised land and the littoral rights of the former inlet front property owners are terminated.

145. Act of July 29, 1995, ch. 529, 1995 N.C. Sess. Laws 1917, 1918 (codified at N.C. GEN. STAT. § 146-1(d) (2003)). This legislation added subsections to sections 146-1 and 146-12 of the General Statutes of North Carolina. *Id.* at 1918-22 (codified at N.C. GEN. STAT. §§ 146-1 to -12 (2003)). The major purpose of the amendments was to provide a legislative response to the North Carolina Court of Appeals decision in *Walker v. N.C. Dep't of Env't, Health & Natural Res.*, which held that an easement from the Department of Administration was required for the construction of a commercial marina over public trust waters. 111 N.C. App. 851, 852, 433 S.E.2d 767, 767 (1993). The amended section 146-12 provides detailed provisions governing the issuance of easements for structures located over state public trust waters. N.C. GEN. STAT. § 146-12.

considered its potential application to section 146-6(f), which was added to the General Statutes in 1985.¹⁴⁶ However, section 146-1(d)'s unambiguous language applies to all of subchapter I, and reading sections 146-1(d) and 146-6(f) together¹⁴⁷ would be consistent with the General Assembly's historical practice in dealing with beach nourishment projects. This historical practice shows a legislative recognition that a public beach nourishment could terminate common law littoral rights and generate claims by oceanfront property owners for compensation based on a taking of private property rights. To avoid this issue, in the legislative authorization of early beach projects, the General Assembly statutorily preserved the littoral rights of the oceanfront property owners.¹⁴⁸

The very first beach nourishment project in North Carolina took place at Wrightsville Beach in 1939.¹⁴⁹ Since the planned beach nourishment project would involve the filling of state-owned submerged lands by the Town of Wrightsville Beach and raising them above the mean high water mark, legislation was needed to authorize the filling and determine title to the raised land. Under this special legislation, title to the raised land would be in the town, but the use of the raised land would be limited to "development and uses as a public square or park."¹⁵⁰ In addition the legislation addressed the status of the oceanfront property owners' littoral rights, "*which will be destroyed or taken by and through the making of such new made lands.*"¹⁵¹ According to the session law, "owners of the property abutting on said newly made or constructed land, shall, in front of

146. Act of May 30, 1985, ch. 276, 1985 N.C. Sess. Laws 226, 226-27 (codified at N.C. GEN. STAT. § 146-6(f) (2003)). Amended section 146-1, in subsection (b), contains a detailed statement of the justification for allowing private and public piers, docks, wharves, marinas, and other structures to be built in and over state-owned public trust submerged lands and waters. N.C. GEN. STAT. § 146-1(b).

147. Section 146-1(d) would be equally applicable to section 146-6(b).

148. See *infra* notes 148-54 and accompanying text.

149. See Duke University Program for the Study of Developed Shorelines, *The U.S. Beach Nourishment Experience*, at <http://www.env.duke.edu/psds/Nourishment/NC.xls> (last visited Aug. 30, 2005) [hereinafter Duke University Study] (including eleven years of ongoing research and data collection, this study lists the Wrightsville Beach Nourishment project of 1939 as the first beach nourishment project in North Carolina) (on file with the North Carolina Law Review). Some might say the very first nourishment project was the massive rebuilding of the Outer Banks that started in 1937. Sarah F. Tebbens et al., *Wavelet Analysis of Shoreline Change on the Outer Banks of North Carolina: An Example of Complexity in the Marine Sciences*, PROC. OF THE NAT'L ACAD. OF SCI. OF THE U.S.A., Feb. 19, 2002, at 2554, available at <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=128575> (on file with the North Carolina Law Review).

150. Act of Mar. 30, 1939, ch. 246, § 1, 1939 N.C. Sess. Laws 508.

151. *Id.* pmbl. at 509 (emphasis added).

their said property, possess and keep their rights, *as if littoral owners*, in the waters of the Atlantic Ocean, bordering on said newly acquired and constructed land.”¹⁵² Thus, in this very first project, the General Assembly, concerned that the raising of submerged lands would have the effect of destroying or taking the common law littoral rights of the oceanfront property owners, decided to grant the former oceanfront property owners substitute statutory littoral rights over the newly raised lands.

The next major beach nourishment project occurred at Carolina Beach in 1965.¹⁵³ Using language identical to that contained in the

152. *Id.* at 510 (emphasis added).

153. See Duke University Study, *supra* note 149 (listing all North Carolina beach projects during the period of 1939–2004). A sister project was commenced at Wrightsville Beach at the same time as the Carolina Beach project. *Id.* Wrightsville Beach and Carolina Beach are two of the most replenished beaches in the United States. PILKEY & DIXON, *supra* note 29, at 88.

In 1959 the General Assembly enacted section 146-6(b), governing title to land raised above navigable waters. Act of June 2, 1959, ch. 683, 1959 N.C. Sess. Laws 612, 614 (codified at N.C. GEN. STAT. § 146-6(b) (2003)). This section, in part, provides that “[i]f any land is, by act of man, raised above the high watermark of any navigable water by filling, except such filling to be to reclaim land theretofore lost the owner by natural causes . . . , title thereto shall vest in the State” N.C. GEN. STAT. § 146-6(b) (2003). The effect of this language was an issue in *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, which was litigation involving the Carolina Beach project. 277 N.C. 297, 177 S.E.2d 513 (1970).

By the early 1960s, a large part of the shoreline in the Town of Carolina Beach had suffered severe erosion. *Id.* at 298–99, 177 S.E.2d at 514. So severe was the erosion that the *Carolina Beach* plaintiff’s ocean front lots had completely eroded away. *Id.* The erosion forces of the wind and waves had eaten away the shoreline and gradually moved the mean high tide line across plaintiff’s lots to the public road running behind them. *Id.* at 303, 177 S.E.2d at 517. After the U.S. Army Corps of Engineers pumped sand along the shoreline, rebuilding the beach, the plaintiff claimed he was the owner of the newly created dry sand beach in the same location as his eroded away lots. *Id.* at 298–99, 177 S.E.2d at 514.

Applying traditional common law principles applicable to littoral property owners, the court concluded that plaintiff’s title to the area was lost as the forces of erosion moved the high tide line across his land. *Id.* at 304, 177 S.E.2d at 517. The forces of nature transformed former privately-owned uplands into state-owned submerged lands. And, when the mean high tide line moved across the rear boundary of plaintiff’s lots, he lost all title to the area. *Id.*

The plaintiff, however, contended that, after the filling, section 146-6(b) vested title to the raised land in him. *Id.* Focusing on the exception in section 146-6(b), the court concluded that, since the purpose of the project was to protect the town from storm damage and not to reclaim lands lost to the plaintiff, the statute vested title in the State and not the plaintiff. *Id.* Even in the absence of section 146-6, title to the raised land would not have been in the plaintiff. *Id.* Plaintiff’s lots had completely eroded away.

Under the traditional common law rule followed in a majority of jurisdictions, absent a state statute to the contrary, once a littoral owner’s land has completely eroded away and the mean high tide line has moved onto the next property owner’s land, that property owner is promoted to the status of a littoral owner with all the rights associated

1939 Wrightsville Beach statute, the General Assembly, in the 1963 statute applicable to the Carolina Beach project, stated once again "that the owners of the property abutting on said newly made or constructed land, shall, in front of their said property possess and keep their rights, *as if littoral owners*, in the waters of the Atlantic Ocean, bordering on said newly acquired and constructed lands."¹⁵⁴ Once again, recognition of the potential adverse impact of a public beach nourishment project led the General Assembly expressly to substitute statutory littoral rights for the common law littoral rights about to be extinguished.

When the General Assembly added section 146-6(f) to the General Statutes, it did so against this existing historical background. Nothing in section 146-6(f) speaks directly to the impact of the publicly funded nourishment project upon an oceanfront property owner's littoral rights. Its effect is limited to determination of questions of title to a nourished beach. Therefore, even though section 146-6(f) places title to the raised land in the state, section 146-1(d) makes it clear that the change of title does not, in and of itself, affect existing common law littoral rights.¹⁵⁵ However, unlike the earlier 1939 and 1963 legislation, section 146-1(d) does not expressly substitute statutory littoral rights for all common law littoral rights lost as the result of a beach nourishment project; its effect is more limited.

b. State's Right To Terminate Littoral Rights by Filling
Adjacent Submerged Lands

The import of section 146-1(d) is simply that nothing in the subchapter, including section 146-6(f), shall limit or expand existing littoral rights. It does not answer the question as to whether, under the common law, existing littoral rights are subject to the inherent qualification that such rights may be extinguished or limited by the

with that status. *See supra* notes 53-56 and accompanying text. Any accretions to the land would adhere to the benefit of the promoted littoral owner and not to the former littoral owner. Therefore, if anyone had a common law claim to the raised land it would not have been the *Carolina Beach* plaintiff. It would have been the owner of the road, which would appear to be the town.

The effect of the project on plaintiff's littoral rights was never at issue and would never have been in issue. They were not at issue because littoral rights presupposes ownership of littoral property. And even if the court had concluded that plaintiff had title to the raised land, the General Assembly, as it had in the Wrightsville Beach situation, specifically addressed the effect upon littoral rights of the Carolina Beach project. *See infra* note 154 and accompanying text.

154. Act of May 22, 1963, ch. 511, § 1, 1963 N.C. Sess. Laws 609, 610 (emphasis added).

155. *See* § 146-1(d).

State by the act of filling and raising adjacent state-owned submerged lands. This issue will be examined next in the context of the specific littoral rights of access and view.

c. Impairment of the Rights of Access and View

Two valuable characteristics of oceanfront property are that the property owners have direct access from their land to ocean waters and they have an unobstructed view of scenic ocean waters.¹⁵⁶ One or both of these features may be jeopardized by a beach project. To protect the newly constructed dune, the vegetation planted to stabilize it, and the habitat created following a beach project, regulations may be promulgated that prohibit oceanfront property owners from crossing the dunes in front of their homes to reach the ocean.¹⁵⁷ No longer able to walk directly out to the beach and ocean waters, the oceanfront property owners instead must walk or drive down a coastal road to one of the designated public beach access paths or walks located at spaced distances along the coastline to reach the beach.¹⁵⁸ And, the dunes created may be so high that, instead of a panoramic ocean view from a living room picture window, the only view is of a wall of sand.¹⁵⁹ Or, the State or Town, as title holder to the raised lands, might decide to place buildings or other structures upon the raised lands which interfere with both the oceanfront

156. The reason the context of the discussion is limited to the right of access and the right of view is that these are the two aspects of oceanfront property ownership that are most likely to be of concern to oceanfront property owners following a beach project, as is demonstrated by the litigated cases discussed in this Article.

Assertion of the state's title to the raised lands also involves a termination of the oceanfront property owner's littoral right to accretions. But, when a beach is seriously eroding, protective dunes have been destroyed, and the waves are pounding near the foundation of oceanfront homes or against a temporary sandbag protective seawall, one would assume that most affected oceanfront property owners would gladly trade their littoral right to accretions for the protection of a nourished beach. Absent such protection, continued loss of shoreline could result in the total loss of an oceanfront lot and all littoral rights. It is after the completion of the project—when the oceanfront property owner discovers that her customary direct access to the beach has been terminated or that her right of view is being destroyed—that the impact of the project on her littoral rights is first fully appreciated. If direct access to the beach is still present and there is no impairment of view, her littoral rights have still been terminated as a result of the project, but the taking has little practical effect and any compensation due would probably not be substantial.

157. See *Slavin v. Town of Oak Island*, 160 N.C. App. 57, 58–59, 584 S.E.2d 100, 101 (2003).

158. See *id.* at 59, 584 S.E.2d at 101.

159. See *City of Ocean City v. Maffucci*, 740 A.2d 630, 632 (N.J. Super. Ct. App. Div. 1999) (noting the defendants' view was completely obstructed by man-made dune and planted dune grasses).

property owner's access to, and view of, the water.¹⁶⁰ In these situations, the property owner may assert that the project has resulted in a taking of valuable littoral rights for which the property owner is entitled to compensation.

3. Cutting Off the Right of Access: *Slavin v. Town of Oak Island*

Slavin v. Town of Oak Island,¹⁶¹ a recent North Carolina case, is an excellent illustration of the denial of direct access to ocean waters.¹⁶² During the summer of 1999, Hurricane Floyd caused tremendous beach erosion along the shoreline of Oak Island, North Carolina, destroying the dunes that protected oceanfront homes.¹⁶³ Forty-five oceanfront homes were destroyed and 430 were damaged,¹⁶⁴ and after the storm Atlantic waters lapped at the footings of many others.¹⁶⁵ A beach project was desperately needed.¹⁶⁶ But, beach nourishment projects take time, and sand was needed quickly in case another storm developed and caused even greater property damage and devastation. As it turned out, two circumstances combined to provide an avenue for an accelerated sand placement project. The first was that the United States Army Corps of Engineers was about to engage in a major dredging project: the "Wilmington Harbor Project."¹⁶⁷ The project was to dredge the channel of the mouth of and the entrance to the Cape Fear River and the Corps needed a disposal site for that sand.¹⁶⁸ The plan was to

160. See *Tiffany v. Town of Oyster Bay*, 136 N.E. 224, 224–25 (N.Y. 1922).

161. 160 N.C. App. 57, 584 S.E.2d 100 (2003).

162. *Id.* at 59, 584 S.E.2d at 101 (noting plaintiffs' direct access to beach was limited to specific access points); see also *Maffucci*, 740 A.2d at 632 (noting the defendants' beach access was only by pathway 80 feet north of condominium).

163. Frank Tursi, *Call of the Beach: Not All Agree That Millions in Rebuilding Is the Way to Go*, WINSTON-SALEM J., Mar. 11, 2001, at A1.

164. *Id.*

165. *Id.* ("The hurricane destroyed 45 first-row houses and damaged 430 of the town's 500 oceanfront buildings, giving Oak Island the distinction after the storm of having the highest concentration of erosion threatened buildings on the coast.").

166. See James Eli Shiffer, *High Tide Leaves Little Beach in Many Beach Towns*, NEWS & OBSERVER (Raleigh, N.C.), July 2, 2000, at 1A. ("Altman [the mayor of Oak Island] has made a plea for more sand before politicians in Raleigh and Washington and anyone else who will listen. On many stretches of the Brunswick County island, the strand disappears at high tide.").

167. See *Cape Fear Harbor Project: Long-awaited Dredging Effort to Start in April*, MORNING STAR (Wilmington, N.C.), Feb. 23, 2000, at 2B (discussing that the Wilmington Harbor Project would begin dredging in April of 2000, only seven months after Hurricane Floyd hit in September of 1999).

168. See *Wilmington Harbor Sand Management Plan: Ocean Entrance Channels and Inner Harbor Between Lower Swash and Reaves Point 3*, at http://nc-es.fws.gov/pubs/fwcal/Wilmington/App_D_sand.pdf (last visited Aug. 30, 2005) ("With the capacity of the

place part of the sand on portions of the eastern and western shores of Oak Island, with other communities receiving the remainder.¹⁶⁹ That project began in December 2000 and was completed two years later.¹⁷⁰

The second was the Oak Island Turtle Habitat project. The dunes on Oak Island, like many of the barrier islands along the Carolina coast, provided nesting habitat for sea turtles.¹⁷¹ Much of that important dune structure had been lost as a result of storms over the past twenty years.¹⁷² But under section 1135 of the federal Water Resources Development Act of 1986, funds were available which could be used for the purpose of restoring sea turtle habitat.¹⁷³ The project would place sand dredged from the Atlantic Intracoastal Waterway along approximately 9,000 feet of Oak Island shoreline.¹⁷⁴ In September 2000, the turtle habitat project commenced.¹⁷⁵

Both projects entailed the placement of sand seaward of the mean high tide line, leaving a narrow depression of submerged land between the landward boundary of the projects and the mean high tide line.¹⁷⁶ The placement of sand moved the mean high tide line

existing ODMDS [offshore dredge material disposal sites] insufficient to accommodate the dredged material disposal volume requirements through 2001, the logical solution is to place the 4.8 million cubic yards of beach quality material on adjacent beaches.”) (on file with the North Carolina Law Review).

169. 7.5.12 Oak Island, Beach Nourishment at http://www.saw.usace.army.mil/wetlands/Projects/BogueInlet/DEIS_All/App%20F%20CEA/App%20F%20pages%2017-30.pdf (last visited Aug. 22, 2005) [hereinafter 7.5.12 Oak Island] (on file with the North Carolina Law Review).

170. Brief for Defendant-Appellee at 2, *Slavin v. Town of Oak Island*, 160 N.C. App. 57, 584 S.E.2d 100 (2003) (No. COA 02-671) (discussing that the project began in December of 2000); 7.5.12 Oak Island, *supra* note 169.

171. See Bruske, *supra* note 108.

172. See Penny Schmitt, *Sand-on-the-Beach Season Opens with Turtle Habitat Project*, WILMINGTON DISTRICT NEWS, Feb. 2001, at 1 (“Over the past [twenty] years, erosion of the island’s dune field has eaten away virtually all the suitable nesting habitat for the turtles.”) (on file with the North Carolina Law Review), available at <http://www.saw.usace.army.mil/PAO/District%20Newsletters/2001/febnews01PNG.PDF>. (on file with the North Carolina Law Review).

173. See *id.* at 3. The Oak Island project was the first beach anywhere nourished by the U.S. Army Corps of Engineers under the category of *habitat restoration*. Orrin H. Pilkey & Andrew S. Coburn, *Throwing Dollars at Beaches: Beach Nourishment Uses Public Money To Save Homes of the Wealthy*, CHARLOTTE OBSERVER, Sept. 23, 2001, at 6D.

174. Schmitt, *supra* note 172, at 1, 3. The project cost \$11.3 million, with the federal government contributing \$5 million and the balance contributed by the State of North Carolina and the local sponsors. *Id.* at 1. Two-point-six million cubic yards of sand was placed on the beach, adding seventy feet to the width of the beach. *Id.* at 1, 3. The project has an estimated life span of ten to fifteen years. Bruske, *supra* note 108.

175. Defendant-Appellee’s Brief at 2, *Slavin v. Town of Oak Island*, 160 N.C. App. 57, 584 S.E.2d 100 (2003) (No. COA 02-671).

176. Plaintiffs-Appellants’ Brief at 5, *Slavin* (No. COA 02-671).

seaward, creating a new dry sand beach and dune between the former mean high tide line and the new one. According to the plan, eventually the narrow depression would also fill in with sand as wind and other natural processes moved sand into this depression, leaving one continuous strand of beach.¹⁷⁷

The reason for the particular placement of the sand was that placement landward of the original mean high tide line would have required the granting of easements for that purpose by all the affected oceanfront property owners.¹⁷⁸ Absent the voluntary granting of the necessary easements, the town¹⁷⁹ would have to exercise the power of eminent domain to acquire them. In addition, even voluntary grants of easements take time to acquire and this project was on a fast-track.¹⁸⁰ Placement of sand seaward of the mean high tide line, however, did not require any private easements because the submerged land lying seaward of that line was state public trust submerged lands.¹⁸¹

Since one major stated objective of the Sea Turtle Project was protection of turtle habitat, the project agreement required the town

177. It did not work completely according to plan, however. High-tide waters breached the dune in June 2001, leaving "puddles as long as football fields and as wide as about 25 feet in some places." Lee Holland, *Oak Island Fills Beach Trench: Sand Dollars Drained*, MORNING STAR (Wilmington, N.C.), June 21, 2001, at 1A. The initial filling of the trench in 2001 cost the town more than \$283,000. *Id.* But, that did not solve the problem. In 2003, the town spent an additional \$225,000 to dump an additional 25,000 cubic feet of sand on the 1.6 mile span of beach. Millard K. Ives, *Oak Island Restarts Sand Operation to Fill in Ditches Left by Turtle Project*, MORNING STAR (Wilmington, N.C.), Apr. 2, 2003, at 2B. One study attributed the cause of the ditch to "poor design" of the project. *Id.*

178. Title to the beach landward of the mean high water mark was in the adjacent oceanfront owners and, absent an easement, the placement of sand landward of the mean high water mark would be a trespass. Plaintiffs-Appellants' Brief at 6, *Slavin* (No. COA 02-671) (town thought it could avoid legal necessity of obtaining "sand replacement easements").

179. The Town of Oak Island was the project sponsor. Under applicable Corps' regulations, the local sponsor is responsible for obtaining all necessary easements. ENGINEER PAMPHLET, *supra* note 107, ¶ 15-3(c).

180. Discussions between the town and the Corps about restoration of sea turtle habitat started in 1992. Allegood, *supra* note 121. But the effects of Hurricane Floyd led the town to urge the Corps to actually undertake the project. *Oak Island: Owners Lose Suit Over Path to Beach*, MORNING STAR (Wilmington, N.C.), Aug. 20, 2003 at 1B. In September 2000, the town and Corps entered into the project contract. *Army Corps of Engineers to Build Up Oak Island Turtle Nesting Habitat*, A.P., Sept. 28, 2000. Although the project commenced in September 2000, the actual placement of sand on the shore did not start until February 2001 and was completed in April. Allegood, *supra* note 121.

181. Record on Appeal at 360, *Slavin* (No. COA 02-671) ("[U]ltimately the Corps recognized that they could place sand on the seaward side of the mean high water mark. And therefore, easements were not necessary because it was already on public trust land.").

to adopt a "Beach Access Plan."¹⁸² This plan was accepted by the Corps in August 2001.¹⁸³ By this time, the Sea Turtle Project was completed and the Wilmington Harbor Project was nearing completion.¹⁸⁴

The Beach Access Plan provided for fencing on and along the length of the Sea Turtle Project's nourished beach and for limiting access to the new dry sand beach to designated beach access points.¹⁸⁵ As a result, the affected property owners no longer could go directly from their oceanfront homes to the dry sand beach.¹⁸⁶ This restriction upset a number of property owners, who filed suit alleging the loss of their right of direct access was a taking for which they were entitled to compensation.¹⁸⁷

In February 2002, the trial court entered summary judgment in favor of the town and the plaintiffs appealed.¹⁸⁸ On August 19, 2003, the Court of Appeals of North Carolina handed down its decision in *Slavin*.¹⁸⁹ On the question of whether the Beach Access Plan constituted a taking, the court of appeals held that "the littoral right of access to adjacent water is a qualified one,"¹⁹⁰ subject to reasonable regulation for the protection of the public rights in navigable waters.¹⁹¹ Since the plaintiffs had not claimed that the Beach Access Plan was an unreasonable regulation of their rights of access, but instead had alleged that the town could not limit, without compensation, their rights of access at all, the trial court's order

182. *Id.* ("What the Corps required was a plan from the Town to maintain the—the dunes that were—that were erected And the plan had to call for access.").

183. Defendant-Appellee's Brief at 3, *Slavin* (No. COA 02-671) ("The [U.S. Army Corps of Engineers] reviewed the Town of Oak Island's access plan, and by letter dated 9 August 2001, found it to be acceptable as part of its work in kind responsibilities under the Project Cooperation Agreement.").

184. Allegood, *supra* note 121.

185. In *Slavin*, the plaintiffs-appellants noted:

Defendant's Access Plan provides for construction of a sand dune fence on the Renourished Beach The Fence is located entirely within the confines of the Renourished Beach. As such, the Fence is located immediately between Appellant's respective properties and the new [mean high water mark] of the Ocean.

Plaintiffs-Appellants' Brief at 6-7, *Slavin* (No. COA 02-671)

186. *Slavin v. Town of Oak Island*, 160 N.C. App. 57, 58, 584 S.E.2d 100, 101 (2003).

187. See *Owners Lose Suit Over Path to Beach*, MORNING STAR (Wilmington, N.C.), Aug. 20, 2003, at 1B.

188. *Id.*

189. *Slavin*, 160 N.C. App. at 59, 584 S.E.2d at 101.

190. *Id.* at 57, 584 S.E.2d at 100.

191. *Id.* at 61, 584 S.E.2d at 102.

granting summary judgment was affirmed.¹⁹² A petition for discretionary review by the Supreme Court of North Carolina was subsequently denied.¹⁹³

The *Slavin* court conceded that littoral rights are vested, but the court asserted the rights are not absolute, but qualified, subordinate to "public trust interests,"¹⁹⁴ a general proposition that was also consistent with traditional common law principles.¹⁹⁵ It is upon that proposition that the elimination of all direct contact with, and incidentally all direct access to, ocean waters in *Slavin* was predicated. But, the question is what qualifications apply to the right of access? That is the real crux of *Slavin*.

In answering that question it is important to recognize that the traditional right of access has three components.¹⁹⁶ One component is the right to maintain direct contact with the waterbody itself. This is reflected in the traditional common law view that the littoral owner has the right of unobstructed access to the waterbody across the full frontage of his land and the right to accretions.¹⁹⁷ The second is the

192. *Id.*

193. 357 N.C. 659, 590 S.E.2d 271 (2003).

194. *Slavin*, 160 N.C. App. at 61, 584 S.E.2d 102. The court never identifies the public interests at stake in *Slavin*. *Id. passim*.

Interestingly, the statement that riparian and littoral rights are vested rights only appears in three other North Carolina opinions and in none of the opinions does the court hold that there was a taking of any riparian right. *Roanoke Rapids Power Co. v. Roanoke Navigation & Water Power Co.*, 159 N.C. 393, 75 S.E. 29 (1912); *Pine Knoll Ass'n v. Cardon*, 126 N.C. App. 155, 484 S.E.2d 446 (1997); *In re Protest of Mason*, 78 N.C. App. 16, 337 S.E.2d 99 (1985). Each of these cases is however distinguishable from *Slavin*. In *Weeks v. North Carolina Department of Natural Resources & Community Development*, the term "vested" is never used, but may be inferred from the context of the opinion. 97 N.C. App. 215, 225–26, 388 S.E.2d 228, 234 (1990).

195. GOULD, *supra* note 1, § 149, at 305 (stating riparian rights must be enjoyed in due subjection to public rights); *id.* § 168, at 334 (stating the right to pier or wharf out is subject to reasonable limitations and the common rights of the people in the waters).

196. *Weeks*, 97 N.C. App. at 225–26, 388 S.E.2d at 234 (stating that a littoral owner has two distinct properties: (1) the principal estate extending to the shoreline and (2) the appurtenant estate of submerged land benefiting the principal estate). The appurtenant estate includes (1) the access to *the navigable water* and (2) the right to erect piers and wharves. *Bond v. Wool*, 107 N.C. 139, 150–51, 12 S.E. 281, 285 (1890).

197. See, for example, *Tiffany v. Town of Oyster Bay*, 136 N.E. 224 (N.Y. 1922), where the New York Court of Appeals stated:

The town may not fill in, occupy, and obstruct with buildings the foreshore under the pretext of providing for the public enjoyment, so as to interfere with the rights of owners of the upland, although they may still be able to reach the water. Their rights pass along the whole frontage of their property.

Id. at 226; see also 1 FARNHAM, *supra* note 15, § 69, at 320 ("One of the most valuable of the rights of the riparian owner is the right to preserve his contact with the water by appropriating accretions which form along his shore."); GOULD, *supra* note 1, § 155, at

right of access to the navigable portion of the water body, or deep water.¹⁹⁸ A third related right is the right, subject to reasonable restrictions, to pier out to reach deep or navigable water.¹⁹⁹ The cases the *Slavin* court relied upon were all cases falling into the third category.²⁰⁰ And these cases are distinguishable on two grounds. The first is that the particular aspect of the right of access involved in those cases—the right to pier or wharf out—has always been subject to reasonable regulation;²⁰¹ the second is that in none of the cited

310–11 (“[L]and formed by *alluvion*, or the gradual and imperceptible accretion from the water . . . belong to the owner of the contiguous land to which the addition is made.”) (emphasis in original); 1 WATERS AND WATER RIGHTS, *supra* note 1, § 6.01(a)(1), at 6–4 (“The first, and most basic, right of a riparian owner is to access to [sic] the water.”).

198. See *Mason*, 78 N.C. App. at 27, 337 S.E.2d at 105 (right of access to “deep” or “navigable water”); 1 WATERS AND WATER RIGHTS, *supra* note 1, § 6.01(a)(1), at 6–6.

199. See, e.g., *Capune v. Robbins*, 273 N.C. 581, 588, 160 S.E. 881, 885 (1968) (ruling that littoral proprietor has an appurtenant estate in the submerged land and the right to construct wharves, piers, or lands, subject to such general rules and regulations as the legislature may enact to protect the public rights in navigable waters). See generally 1 FARNHAM, *supra* note 15, § 62, at 279 (“The riparian owner is . . . entitled to have his contact with the water remain intact. This is what is known as the right of access, and includes the right to erect wharves to reach the navigable portion of the stream. The wharfage right is subject to several limitations, however . . .”).

200. In its decision, the *Slavin* court relied upon the following cases: *Bond v. Wool*, 107 N.C. 139, 12 S.E. 281 (1890); *Capune v. Robbins*, 273 N.C. 581, 160 S.E. 881 (1968); and *Weeks v. North Carolina Department of Natural Resources & Community Development*, 97 N.C. App. 215, 388 S.E.2d 228 (1990). *Slavin v. Town of Oak Island*, 160 N.C. 57, 60, 584 S.E.2d 100, 102 (2003). In *Bond*, the defendant was accused interfering with the plaintiff’s right of access to his wharf. 107 N.C. at 153, 12 S.E. at 286. The plaintiff alleged that the placement of the defendant’s wharf within the defendant’s area of access would cut off one means of approach to plaintiff’s wharf. *Id.* The court affirmed the dismissal of the action because there was no showing that the defendant’s wharf extended outside defendant’s area of access or intruded into plaintiff’s. *Id.* *Capune* dealt with whether or not the defendant had the common law right to prohibit the plaintiff from passing under the pier on his surfboard. 273 N.C. at 587, 160 S.E.2d at 885. In a broader view, the issue was “whether the right of a littoral proprietor to construct a pier and thereby provide access to ocean waters of a greater depth authorizes him to exclude the public from the use of the waters of the ocean under and along such pier,” and the court said there was no such right. *Id.* at 589, 160 S.E.2d at 886. In *Weeks*, the plaintiff wanted to build a 900-foot pier into the sound, but was denied a permit. 97 N.C. App. at 216, 388 S.E.2d at 229. He thought he had a right to build the pier to such lengths. *Id.* But the court held that the exercise of the right to pier out was not absolute but subject to reasonable limitations. *Id.* at 226, 388 S.E.2d at 235.

201. See *Capune*, 273 N.C. at 588, 160 S.E.2d at 886; *Bond*, 107 N.C. at 148, 12 S.E. at 284; *Weeks*, 97 N.C. App. at 226, 388 S.E.2d at 234; GOULD, *supra* note 1, § 168, at 334. When discussing the development of the right to access deep water by erecting wharves, Gould points out that in the United States “this rule is subject to reasonable limitations.” GOULD, *supra* note 1, § 168, at 334.

cases was the property owner deprived of all access to the waterbody.²⁰²

North Carolina has long recognized that soundfront property owners have the right of access to deep water over that portion of the waterbody forming what is referred to as the area of riparian access.²⁰³ It is in that area that a pier may be constructed or a channel dredged to provide access to the deep water.²⁰⁴ This right of access to deep water across public trust waters and submerged lands is not absolute. To protect the public trust uses of such waters and submerged lands, the State may regulate the construction of piers or dredging of channels.²⁰⁵ The placement and construction of piers may be restricted to protect shellfish beds, salt marsh, and fishery habitat.²⁰⁶

202. In *Bond*, the plaintiff was not at risk of losing all access to his property, something the court pointed out when it said he would still have access to his land from the south. 107 N.C. at 151–52, 12 S.E. at 285–86. In *Capune*, the pier owner was not at risk of losing his access to the water, he just had to allow the public to use the land and water under his pier. 273 N.C. at 589, 160 S.E.2d at 886. In *Weeks*, the plaintiff still had access and the right to pier out, he just could not pier out 900 feet. 97 N.C. App. at 216, 388 S.E.2d at 229.

203. See, e.g., *Mason*, 78 N.C. App. at 28, 337 S.E.2d at 106 (stating that riparian access zone “only extends as far as necessary to provide access to the ‘navigable parts’ of the waterway”). See generally 1 WATERS AND WATER RIGHTS, *supra* note 1, § 6.01(a), at 6-6 (“The right of access includes the right to proceed without unreasonable impediment to the navigable portion of the water.”).

204. See William B. Aycock, *Introduction to Water Use Law in North Carolina*, 46 N.C. L. REV. 1, 18–19, (1967), discussing that sounds are navigable waterways and continuing:

Although a riparian owner does not own the bed of a navigable water course, he does own the banks, and he is entitled to certain rights by virtue of this fact Subject to regulations as may be imposed by the legislature, he has a right to construct wharves, piers, and landings on the water frontage.

Id.; see also 1 FARNHAM, *supra* note 15, § 113b, at 534 (“One is that the riparian owner’s right of access includes the right to connect his water front with the point of navigability.”).

205. Professor Farnham stated:

This right [erection of wharves] can be utilized only by those who can obtain access to the water, and, since the only ones who can obtain such access are riparian owners, they have a right, as members of the general public, to utilize the soil for the erection of such wharves and piers for the purpose of aiding navigation as can be placed there without injury to the rights of the public [T]he right of access and communication with the navigable waters, which pertains particularly to the ownership of the upland, necessarily includes the right to fill in and to build wharves and other structures in the shallow water in front of such land and below low-water mark, and the exercise of such right, though subject to state regulation, can only be interfered with for public purposes

1 FARNHAM, *supra* note 15, § 113b, at 533–34.

206. See N.C. ADMIN. CODE tit. 15A, r. 7H.1204(d) (Aug. 1998) (explaining that a permit to build a pier will not be given if the proposed activity might “unnecessarily

For example, in *Weeks v. North Carolina Department of Natural Resources & Community Development*,²⁰⁷ the Court of Appeals of North Carolina upheld the denial of a waterfront property owner's application for a CAMA permit to build a 900-foot-long pier in Bogue Sound based on public trust concerns.²⁰⁸ This is quite different from barring a waterfront property owner from exercising her traditional right of maintaining direct contact with the waterbody and having access directly from her adjacent uplands. Furthermore, in *Weeks*, the court pointed out that the petitioner could still seek permission for a shorter pier.²⁰⁹ The issue was not a complete denial of the right of access to deep water, but only a balancing of that right against the public trust interests existing in the state-owned lands and waters over which that right was sought to be exercised.

In *re Protest of Mason*,²¹⁰ another court of appeals decision, reinforces these points. In *Mason*, a soundfront property owner objected to granting by the State of a shellfish lease²¹¹—a public trust use.²¹² The lease granted the lessee permission to use an area of submerged land that extended into the soundfront property owner's area of riparian access.²¹³ Pursuant to this lease, the lessee planned to place netting on the sound bottom, held in place by stakes, to protect the shellfish beds the lessee would establish in the area.²¹⁴ The soundfront owner asserted that these activities would infringe on his vested riparian right of access to deep water.²¹⁵ This assertion was apparently based on the belief that only he, as the waterfront owner, had the right to place obstructions or structures within his area of

endanger" or "significantly affect" conservation values, among other things, which are identified in sections 113A-102 and 113A-113(b)(4) of the General Statutes of North Carolina), available at http://www.nccoastalmanagement.net/Rules/Text/t15a_07h.pdf (on file with the North Carolina Law Review). Among the goals laid out in those statutes is the establishment of policy guidelines for the "[p]rotection, preservation, and conservation of natural resources including but not limited to water use, scenic vistas, and fish and wildlife." N.C. GEN. STAT. § 113A-102(b)(4)(a) (2003).

207. 97 N.C. App. 215, 388 S.E.2d 228 (1990).

208. *Id.* at 218, 388 S.E.2d at 230.

209. *Id.* at 226, 388 S.E.2d at 235.

210. 78 N.C. App. 16, 337 S.E.2d 99 (1985).

211. *Id.* at 17, 337 S.E.2d at 100.

212. Fishing, including shellfishing, is one of the triad of traditional public trust uses. Although a shellfish lease authorizes a private party to establish a shellfish bed on state-owned submerged lands in an area where no natural shellfish beds exist, the purpose of the lease is the promotion of a traditional public trust use of public trust lands and waters. See N.C. GEN. STAT. § 113-202 (2003); DAVID C. SLADE ET AL., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 252–53 (1990).

213. *Mason*, 78 N.C. App. at 18, 337 S.E.2d at 100.

214. *Id.* at 18–19, 337 S.E.2d at 100.

215. See *id.* at 27, 337 S.E.2d at 105.

riparian access. And, in fact, an old Supreme Court of North Carolina opinion upholding an action of trespass brought by a waterfront owner against an adjacent waterfront owner whose pier extended into the plaintiff's area of riparian access would appear to substantiate such a belief.²¹⁶ However, that case, unlike *Mason*, did not address the right of the State as owner of the submerged public trust lands to authorize uses by third parties of the area of riparian access. The waterfront owner's right to use the area of riparian access is in the nature of an easement appurtenant. And, as is the case with such an easement, the owner of the dominant estate—in *Mason*, the State—is entitled to make use of the area subject to the easement so long as such use does not interfere with the rights of the easement holder.²¹⁷ The *Mason* lease contained an express condition that "that portion of the lease area within the limits of . . . [Mason's] areas of riparian rights shall be made subject to the lawful exercise of those rights including the right to build a pier for access to navigable waters within the lease."²¹⁸ Thus in *Mason*, as in *Weeks*, there was not a complete denial of any right of direct access. In fact, *Mason* stands for just the opposite proposition: that, when authorizing third party uses of a riparian owner's area of riparian access, the State must respect the rights of the riparian owner.²¹⁹

In the *Slavin* setting, analogous reasonable restrictions might limit the type and nature of the littoral means of direct access to the shore and ocean, but not foreclose all direct access. Such reasonable restrictions are in place all along the North Carolina coast.²²⁰ For

216. See *O'Neal v. Rollinson*, 212 N.C. 83, 192 S.E. 688 (1937) (issuing a mandatory injunction to compel removal of wharf constructed by neighboring owner because it trespassed upon plaintiff's area of riparian access). But see *Flowers v. Blackbeard Sailing Club, Ltd.*, 115 N.C. App. 349, 350, 444 S.E.2d 636, 637 (1994) (barring an objecting riparian owner from seeking injunction due to failure to pursue administrative remedies before North Carolina Coastal Resources Commission).

217. See generally JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND* ¶ 8.04[1] (rev. ed. 2001) (discussing rights of owner of servient estate).

218. *Mason*, 78 N.C. App. at 26, 337 S.E.2d at 105.

219. The littoral right of access to the waterbody is not the same as the right of access an ordinary landowner has to a public road. See *Dep't of Transp. v. Suit City of Aventura*, 774 So. 2d 9, 13 (Fla. Dist. Ct. App. 2000). The State may be entitled to cut off a landowner's direct access to a road or highway without paying compensation. *Id.* at 12. But a complete elimination of a littoral owner's direct access, without compensation, is inconsistent with the notion that littoral rights are unique and vested rights. *Id.*

220. CAMA regulations reasonably restrict beach access along the North Carolina coast. See N.C. ADMIN. CODE tit. 15A, r. 7H.0308(c) (Aug. 2002), available at http://www.nccoastalmanagement.net/Rules/Text/t15a_07h.pdf (on file with the North Carolina Law Review); *id.* r. 7K.0207 (Dec. 1991).

example, the construction of access walkways extending across the dunes from homes to the beach have to be designed and constructed in a manner which entails negligible alteration on the primary dune, limited to pedestrian use, less than six feet in width, and raised above the dune.²²¹ But, such restrictions do not preclude all direct access by the oceanfront property owner.

If complete abridgment of an oceanfront owner's right of direct contact with the ocean is to be justified, it must be on the ground that the State,²²² as owner of the submerged lands fronting the oceanfront property, has a common law right to fill those submerged lands and destroy oceanfront owner's littoral right of maintaining direct contact with the ocean without paying any compensation. Whether the state has such a right is not clearly answered by North Carolina case law.

a. Does Mere Ownership of Submerged Land Grant Both a Right To Fill and To Terminate Existing Littoral Rights?

The mere fact that the State owns the submerged land and has a right to fill it does not mean that it may terminate common law littoral rights by filling the submerged lands. No North Carolina case directly addresses the question.²²³ The issue, however, has been

221. *Id.* r. 7H.0308(c) (Aug. 2002).

222. In *Slavin*, it was the Town of Oak Island, not the State of North Carolina, which undertook the beach nourishment project. *Slavin v. Town of Oak Island*, 160 N.C. App. 57, 58, 584 S.E.2d 100, 101 (2003). Serious questions have been raised as to whether the town (1) in fact had the requisite authority to fill the state-owned submerged lands and (2) exceeded its statutory municipal powers in limiting the oceanfront property owners' direct access to the ocean. For an excellent discussion of the latter issue, see Brian C. Fork, Recent Development, *A First Step in the Wrong Direction: Slavin v. Town of Oak Island and the Taking of Littoral Rights of Direct Beach Access*, 82 N.C. L. REV. 1510, 1513-18 (2004).

223. There are two early twentieth-century decisions, *Atlantic & N.C.R. Co. v. Way*, 169 N.C. 1, 85 S.E. 12 (1915) and *Atlantic & N.C.R. Co. v. Way*, 172 N.C. 774, 90 S.E. 937 (1916) (involving the same litigation over the title to submerged land raised above sea level), that might form the basis of an argument that the State's title to, and control over, submerged lands allows it to fill submerged lands and thereby terminate any common law riparian or littoral rights which may have existed. However, on close examination, the decisions do not support such an argument. These cases involved land in Morehead City, North Carolina. *Atlantic*, 169 N.C. at 2, 85 S.E. at 13. In this litigation, the plaintiff asserted title to an area of formerly submerged land covered by a grant allowing it to construct wharves on submerged lands fronting its uplands property adjacent to Bogue Sound. *Id.* As the result of a state project involving the construction of a seawall and the filling of the submerged land behind it—an act to which the plaintiff consented—the area covered by plaintiff's grant was raised above sea level. *Id.* at 3, 85 S.E. at 13. The plaintiff did not claim that the filling had taken any of its littoral rights; only that under its grant it had title to the raised land. *Id.* at 2-3, 85 S.E. at 13. Since plaintiff's grant was limited to an easement for wharf purposes and the plaintiff consented to the filling of the area encompassed by the grant, an act incompatible with the easement, the court held that the

addressed in other jurisdictions.²²⁴ For example, in *Tiffany v. Town of Oyster Bay*,²²⁵ a case decided by the Court of Appeals of New York, the waterfront property owner, believing he owned the submerged land adjacent to his uplands, filled a sizable portion.²²⁶ Unfortunately for him, it was determined that it was the town that held title to the submerged land, both before and after it was raised.²²⁷ Having title to the raised land, the town decided to make full use of it and construct a structure containing thirty-three public bath houses of about fifty feet by ten to fifteen feet each.²²⁸ The waterfront property owner sued the town and the court enjoined the town from proceeding with its plan because it would interfere with the waterfront owner's right of access along the full length of his frontage.²²⁹ According to the court:

[T]he filled-in land retains its character as land under water, and the plaintiff, as owner of the adjacent upland, has the same rights, and no greater rights, in and across the same, as if no filling had been done, or *as if the filling had been done lawfully by the town; and that plaintiff's rights as a riparian owner*

wharf easement rights were extinguished. *Atlantic*, 172 N.C. at 778–79, 90 S.E. at 939–40. Therefore, the key to the loss of plaintiff's easement and any other rights of use to the submerged lands and overlying waters was the plaintiff's consent. There is no suggestion that, without the consent of the easement holder, the State may fill state-owned submerged land and destroy either (1) private easement rights acquired by a state grant or (2) common law riparian or littoral rights.

224. In addition to *Tiffany v. Town of Oyster Bay*, which is discussed *infra* notes 225–32 and accompanying text, cases from other jurisdictions have reached a similar conclusion. In *Hilt v. Weber*, the Michigan Supreme Court stated:

The state cannot impair or defeat riparian rights by a grant of land under water; nor cut off the owner's access to the water by construction of a highway; nor grant to strangers the right to erect wharves in front of his property; nor erect a bathhouse on the shore to interfere with the right of access. *On the contrary, the right of the state to use the bed of the lake, except for the trust purposes, is subordinate to that of the riparian owner.*

233 N.W. 159, 168 (Mich. 1930) (emphasis added) (internal citations omitted); *see also* *People v. Travis*, 119 N.E. 437, 442 (N.Y. 1918) (“[W]hoever owned the fee of the land under water it was subject to his right of access to the water. It seems to follow that the town could not fill in and reclaim such land and so deprive him of it.”). *See generally* GOULD, *supra* note 1, § 150, at 279 (explaining that a state's mere ownership of the bed and shores of navigable waters does not mean the State can take a riparian or littoral property owner's right of access away without compensation).

225. 136 N.E. 224 (N.Y. 1922).

226. *Id.* at 225.

227. *Id.*

228. *Id.*

229. *Id.*

*continue and he has not become an inland owner to the extent of the fill.*²³⁰

The court held that the town of Oyster Bay was not precluded from using the filled land as a public beach,²³¹ but only prohibited from erecting structures which would interfere with the waterfront property owner's direct access, along the whole of his frontage, to the water by crossing the filled land.²³² It is interesting that in the *Tiffany* case the filled land retained its character as submerged land insofar as the plaintiff's littoral rights were concerned. But, of course, that is simply an elliptical way of saying that, under the *Tiffany* circumstances, littoral rights may not be terminated by filling without compensation.

b. May the State Terminate Existing Littoral Rights When the Purpose of the Filling is To Protect or Promote Legitimate Public Trust Rights or Interests?

Although mere ownership of submerged lands does not mean that the State's filling and raising of submerged lands permits an uncompensated interference or termination of existing littoral rights, if the purpose of the filling is the protection or promotion of legitimate public trust uses or interests, then any interference or termination would not constitute a compensable taking.²³³ In a number of cases, the courts have held that where the State exercises its powers pursuant to the public trust and deprives an owner of his right of access there is no compensable taking.²³⁴ For example, in

230. *Id.* at 226 (emphasis added).

231. *Id.* The town was asserting its right to use the filled land in any way it considered proper, free from all easements the plaintiff may claim. *Id.* Here, the town wanted to devote the filled land to the public as a park. *Id.* The court ruled that the town would not be able to construct buildings on the filled land that would interfere with the plaintiff's rights "under the pretext of providing for public enjoyment." *Id.* The court, however, did not say that the land could not be used as a public beach. The only requirement was that there be no construction that would impede the plaintiff's riparian rights.

232. *Id.*

233. See *supra* notes 187-95 and accompanying text. See generally *Lake Front-East Fifty-Fifth Street Corp. v. City of Cleveland*, 21 Ohio Op. 1 (1939), *aff'd*, 36 N.E.2d 196 (Ohio Ct. App. 1941) (stating that a littoral or riparian owner's right of access is not an unlimited right; rather, the State does not have to compensate the owner for interference with or the destruction of his right of access when the work in front of his property is done for the improvement of navigation and water commerce); 1 WATERS & WATER RIGHTS, *supra* note 1, § 6.01(a)(1), at 6-7 (noting that the government may cut off right of access through navigation servitudes or similar public rights).

234. A 1939 Ohio Court of Common Pleas opinion, *Lake Front-East Fifty-Fifth Street Corp. v. City of Cleveland*, cites a long line of cases from a number of jurisdictions which

Koyer v. Miner,²³⁵ a 1916 California case, to improve navigation in the City of San Pedro harbor, a seawall was erected on state-owned submerged land within the harbor and the area between the seawall and the shoreline filled.²³⁶ The filled area was then leased to a company for use in connection with an electric railroad franchise.²³⁷ As a result, the plaintiff's direct access to the water was cut off, leaving him with access only by means of the neighboring public streets.²³⁸ Quoting from an earlier case also involving a claim of loss of access, the court stated:

When the public authorities see fit to make improvements on the land below high-water mark for purposes of navigation, the riparian owner must yield thereto The littoral rights of the [plaintiff] can not impinge upon the control by the state of tidelands for the public purposes of navigation and fishery, or affect the public easement for those purposes If such improvements have the effect of cutting off access over said tidelands from the upland lot of the plaintiff, it is no ground of complaint, because, as has been pointed out, it had no right as an upland owner to the free and unobstructed access to navigable waters over said tidelands as against the right of the state to at any time devote them to the improvement of the harbor of Oakland in aid of the public easement of navigation and commerce.²³⁹

This case and similar cases from other jurisdictions²⁴⁰ firmly support the proposition that littoral rights of access may be cut off, without compensation, when the State fills adjacent submerged land in the process of promoting or protecting public trust uses or interests.²⁴¹ Therefore, in some instances, the public trust doctrine would support the termination, without compensation, of an oceanfront property owner's right of direct access to the ocean, as well as other littoral rights.

allowed an interference or destruction of the riparian or littoral right of access without compensation when done in aid of navigation and commerce. 21 Ohio Op. at 20.

235. 156 P. 1023 (Cal. 1916).

236. *Id.* at 1024.

237. *Id.*

238. *Id.* at 1024.

239. *Id.* at 1025 (quoting *Henry Dalton & Sons Co. v. Oakland*, 143 P. 721, 722–23 (Cal. 1914)).

240. See *supra* note 234.

241. *Koyer*, 156 P. at 1025.

c. What are Legitimate Public Trust Rights or Interests?

In the context of a beach project, the important questions are what interests or uses constitute "public trust" uses or interests and whether the protection or promotion of such uses or interests is the purpose of the project. In a number of jurisdictions, public trust uses or interests are limited to the traditional common law triad: navigation, water commerce, and fishing.²⁴² In those jurisdictions, a beach project having as its purpose shoreline protection and reduction of storm damage to oceanfront homes and buildings and public infrastructure would not satisfy a public trust test. Unlike the *Koyer* case,²⁴³ the typical beach project does not involve a filling of submerged lands as an intricate part of a harbor improvement project. As happened in *Slavin*,²⁴⁴ the sand that is deposited on the beach may spoil as a result of some channel maintenance or other harbor dredging project, but the fact that a spoil site is needed and the beach nourishment project provides an acceptable location does not provide an intrinsic link between the navigation project and the beach nourishment project. There may be many other acceptable locations for deposit of the soil.²⁴⁵ In order for a sufficient linkage to exist between a navigation or harbor project and the depositing of soil in a particular location, the deposit site should be located within the harbor area and form part of the upland harbor improvements. Absent a requirement of such a linkage, the dredged spoil could be deposited in any coastal location on any state-owned submerged lands and the argument made that the filling promotes public trust interests. If that were the case, the continued existence of the littoral right of access would depend on the whim of the authority deciding where to deposit dredged spoil. Surely, a more sufficient connection between the navigation channel or harbor dredging and the deposit site should be required before an oceanfront property owner's littoral right of direct access to the ocean is terminated without compensation.²⁴⁶

242. See, e.g., 4 WATERS AND WATER RIGHTS, *supra* note 18, § 31.01, at 81 (stating the three traditional public trust interests: navigation, fishing, and water commerce) (citing *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892)); JAMES A. WEBSTER, JR., 2 WEBSTER'S REAL ESTATE LAW: POSSESSORY ESTATES AND PRESENT INTERESTS IN REAL PROPERTY § 16-11 (5th ed. 1999) ("Using waters for navigational purposes and fishing purposes constitute traditional public rights.").

243. See *supra* note 235.

244. See *supra* note 161.

245. State legislation, coastal management regulations and permit requirements will dictate which locations are acceptable.

246. See *supra* notes 233-35 and accompanying text.

In a number of jurisdictions, a broader group of activities are considered to be part of the public trust.²⁴⁷ North Carolina's accepted public trust interests or uses include "the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the state and the right to freely use and enjoy the state's ocean and estuarine beaches" ²⁴⁸ Since one public trust right is the right to use and enjoy the state's beaches,²⁴⁹ actions taken by the State to protect the beaches from severe erosion and loss of public use arguably would permit, without compensation, restricting or denying oceanfront property owners direct access to ocean waters across the raised shore. The difficulty for the state in most instances is that beach projects are federally-funded projects, the typical purpose of which is storm hazard mitigation²⁵⁰ and in no jurisdiction is storm hazard mitigation itself a public trust interest. The protection, creation, or restoration of a dry sand beach is only an incidental consequence of a federally funded beach project.²⁵¹ The primary

247. See generally SLADE ET AL., *supra* note 212, at 129–53.

248. N.C. GEN. STAT. § 1-45.1 (2003).

249. Of course, one interpretative question is what are the "state's beaches"? Does that include only the wet sand or does it include the dry sand beach as well? That issue is currently being litigated in North Carolina. See *supra* note 12. The following discussion assumes that the State's position in that litigation will prevail. If it does not, then beach projects in general would not satisfy a public trust test.

250. In the typical large-scale federal-state beach nourishment project, the principal purpose is to build up the beach and dunes to protect shoreline homes and other structures from erosion and storm and hurricane damage. Recreational benefits are incidental to the this purpose. The current Corps regulations state:

14.1. Beach Erosion Control.

* * *

- (e). Project Formulation. Shore projection projects are formulated to provide for hurricane and storm damage reduction. On this basis any enhancement of recreation that may also result is considered incidental

- 14.2. Recreation. . . . If . . . the project is characterized as being primarily for recreation . . . , it will not be proposed by the Corps as a Federal undertaking, since recreation developments are not accorded priority in Civil Works budget decisions

ENGINEER PAMPHLET, *supra* note 107, ¶¶ 14-1(e), 14-2.

251. This is not to suggest that the federal purpose underlying a beach nourishment project describes the totality of the public benefits from the project or incidental purposes of the project. Purposes such as protection of infrastructure and public safety provide valid public benefits and may be important incidental purposes for a project. But if these other purposes are to provide a justification for the non-consensual, uncompensated termination of existing littoral rights, then these purposes must both be valid public trust

purpose—storm hazard mitigation—would not fall within even North Carolina's broad list of public trust uses.²⁵²

That does not mean that a particular beach project, or a portion of the project, legitimately could not be sufficiently linked with the public trust. It is arguable that, in *Slavin*, the portion of the project that was designed to protect sea turtles and their habitat might in fact be sufficiently connected to fishing to qualify. Sea turtles are not only creatures of the sea but, until recently, were captured and eaten just as other sea creatures.²⁵³ When the populations of species of sea turtles declined and appeared endangered, the taking of sea turtles was prohibited and the government passed legislation to protect and enhance sea turtle habitat.²⁵⁴ The re-establishing of the sea turtle habitat and the closure of direct access to the beach to protect the habitat then is an activity related to traditional public trust uses. And, if sufficiently related, the State could fill the submerged lands for that purpose, cut off the littoral owners from direct access and contact with the ocean, and not have to pay any compensation to those owners.

How much of a public trust connection is necessary to allow the State to cut off the littoral owner's right of access across filled state submerged lands? To avoid the Fifth Amendment compensation,²⁵⁵ one requirement of modern takings law is that the government regulation must "substantially advance legitimate state interests."²⁵⁶ Absent such a nexus, the governmental regulation is only a ruse to avoid constitutionally compelled compensation.²⁵⁷ In the coastal setting, to avoid any compensation requirement, planners could always include in the beach project description the promotion or protection of some public trust interest in the beach as an incidental

purposes and substantial purposes of the project. Otherwise, there would be no realistic limitation on the state power to terminate littoral rights since some incidental public benefit or public trust purpose could almost always be found for a beach project.

252. See *supra* note 248 and accompanying text.

253. See *Leatherback Sea Turtles*, at http://www.bagheera.com/inthewild/van_anim_turtle.htm (last visited Aug. 20, 2005) ("Humans have long hunted adult sea turtles for food and for their shells and other parts.") (on file with the North Carolina Law Review).

254. See NOAA Fisheries Office of Protected Resources, *About Marine Turtles*, at http://www.nmfs.noaa.gov/prot_res/PR3/Turtles/turtles.html ("All six species of sea turtles in the US are protected under the Endangered Species Act of 1973.") (last visited Aug. 20, 2005) (on file with the North Carolina Law Review).

255. U.S. CONST. amend. V.

256. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

257. See, e.g., *Yee v. City of Escodido*, 503 U.S. 519, 530 (1992) (stating that sufficient nexus must exist); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834–35 (1987) (quoting *Agins*, 447 U.S. at 260–62).

purpose. Therefore, unless the purpose of a beach project is substantially connected with one or more legitimate public trust purposes—absent the signing of an agreement under which the oceanfront property owner gives up some or all of her traditional common law right of access or the provision of statutory substitute littoral rights—the fact that the filling is a filling of state-owned public trust lands does not allow the state or other public entity to terminate, without compensation, an oceanfront property owner's right to have direct access to the water. Title to the raised submerged land may be in the state, but, irrespective of whether the land is submerged or raised, that title remains subject to the littoral owner's right of access. Furthermore, even assuming a beach project qualified under the North Carolina public trust test, in situations in which there is a complete denial of all direct access, the State also should have the burden of establishing that such a restriction is necessary and that no lesser limitation on the right of direct access reasonably would achieve the objective of protecting the public trust interest at stake.²⁵⁸

4. The Littoral Right of View

a. Is There Such a Right in North Carolina?

In addition to impairment of the oceanfront owner's right of access, a beach nourishment project may seriously affect the oceanfront owner's view of the ocean. Prior to the project, the oceanfront owner may have had a clear, unobstructed view of the sea. Following the project, the oceanfront owner may be looking at the backside of an artificial dune or be eye level with a public boardwalk constructed along the nourished beach.²⁵⁹ Gone is a valuable attribute of the oceanfront property—the ability to sit on the deck or in the living room and gaze out to sea. In such circumstances does the

258. See generally STEVEN J. EAGLE, *REGULATORY TAKINGS* § 11.10 (2d ed. 1996) (discussing the requirement of proportionality between means and ends in takings law).

259. Impairment of the right of view may not be an issue outside areas in which the oceanfront homes are older. Compliance with federal and state flood zone regulations means that the first habitable floor of new construction must be elevated, generally on pilings, to or above the base (or 100) year flood elevation. See *Floodplain Management Criteria for Flood-Prone Areas*, 44 C.F.R. § 60.3(e) (2004) (making code requirements for all new construction and substantial improvements in the coastal high hazard area); N.C. ADMIN. CODE tit. 15A, r. 7H.0308(d) (Aug. 2002) (listing construction standards), available at http://www.nccoastalmanagement.net/Rules/Text/t15a_07h.pdf (on file with the North Carolina Law Review). Unless the manmade dunes are extraordinarily high or other facilities that obstruct the view are placed on the state-owned beach, beach nourishment projects and other activities are unlikely to obstruct the view of adjacent oceanfront property owners.

oceanfront owner have any legal claim for the impairment of her or his ocean view? That depends on whether the right of view is one of the common law rights of littoral landowners.

No North Carolina case explicitly recognizes the right of view,²⁶⁰ and it is not one of the traditionally listed rights of littoral or riparian ownership.²⁶¹ Traditional littoral and riparian rights are grounded in the needs of navigation, fishing, and water commerce, not in recreational needs and activities.²⁶² But times have changed, and most people buy waterfront land, whether for commercial or personal use, for its recreational benefits, water views and breezes, and not for any water commerce feature.²⁶³ And, most waterfront owners would be surprised to discover that the State could obstruct that view, destroying much of the value of the property, without having to

260. In *Springer v. Joseph Schlitz Brewing Co.*, Judge Butzner states that "[i]n North Carolina, a riparian landowner has a right to the agricultural, recreational, and scenic use and enjoyment of the stream bordering his land" but cites no authority for the proposition. 510 F.2d 468, 470 (4th Cir. 1975).

261. Although the right of an unobstructed view is not one of the traditional littoral rights, in 1918, the first Florida opinion discussing the right does it in a manner suggesting that there is no doubt as to the right. In *Thiesen v. Gulf, F. & A. Railway Co.*, the court, without citations, simply says "[t]he common-law riparian proprietor enjoys [the right] . . . of an unobstructed view over the waters . . ." 78 So. 491, 501 (Fla. 1917). On the other hand, a 1901 Illinois case, *Chicago Yacht Club v. Marks*, rejects the proposition that a riparian has a protected right of view and states that no authority has been cited to the court supporting such a proposition. 97 Ill. App. 406, 413 (1901), *aff'd*, 76 N.E. 582 (Ill. 1905).

262. See, e.g., 1 FARNHAM, *supra* note 15, § 62, at 278-80 (discussing rights of riparian owners and activities associated with rights).

263. In the 1930s the city of Los Angeles used the power of eminent domain to acquire the water in the streams flowing into Mono Lake. The water was to be diverted to supply the needs of the city. One consequence of the diversion would be a drastic lowering of the lake to one-tenth of its existing level within five years. The plaintiffs in *City of Los Angeles v. Aitken*, were shoreline resort owners, whose properties would dramatically decrease in value as a result of the lowering of the lake level. 52 P.2d 585, 587 (Cal. Ct. App. 1935). In holding that the plaintiffs were entitled to substantial sums as damages for their littoral rights to require the maintenance of the natural level of the lake, the court said:

They purchased land bordering on this unique lake and constructed improvements thereon for the maintenance of auto camps and pleasure resorts which are dependent for their success upon the income derived from the traveling public which is attracted to this alluring lake by these advantages. These enterprises depend on the continuation of these attractions. Without the existence of this lake and its surrounding attractions the value of the respondents' properties will be practically destroyed. These privileges and attractions constitute important assets in determining the value of their properties. Moreover, among the essential littoral rights which are possessed by the respondents is their lawful right to the unmolested access to the lake.

Id. at 588-89.

compensate the waterfront property owner. Unfortunately, presently only a very few jurisdictions provide legal protection to the waterfront owner's view of the waterbody.²⁶⁴

b. Judicial Recognition of the Right of View

Although the origins of judicial recognition of the concept of the right of view is found in a line of Florida cases,²⁶⁵ a recent New Jersey case is the first to apply the concept in the beach nourishment setting. In 1993, as part of a beach nourishment project, the Corps and State of New Jersey built new sand dunes along seven miles of New Jersey shoreline.²⁶⁶ The new, nine foot high dunes completely obstructed the previously existing view of the ocean from the first floor of a condominium.²⁶⁷ In a case of first impression, the Superior Court of New Jersey, Appellate Division, held that loss of ocean view was an element of compensable severance damages.²⁶⁸ The basis for the court's conclusion was that an ocean view was a feature that played a substantial role in determining what a buyer of property would pay and that an owner of such property had a reasonable expectation would continue.²⁶⁹

The conclusion of the New Jersey court, and other courts that have considered the issue, makes sense. As realtors say, the most important feature of a piece of property is "location, location, location." Not taking into account when appraising an oceanfront property the fact that it has an ocean view, which was the position of the defendants in the New Jersey case, is silly. The New Jersey court did say that the right of view was not absolute,²⁷⁰ which means that the State could, in some instances, cut off that right without having to pay compensation for the loss. But, interference, without

264. The following jurisdictions recognize a right to an unobstructed view: (1) Florida, see *Hayes v. Bowman*, 91 So. 2d 795, 801 (Fla. 1957); *Thiesen*, 78 So. at 501; *Lee County v. Kiesel*, 705 So. 2d 1013, 1015 (Fla. Dist. Ct. App. 1998); (2) Mississippi, see *Miss. State Highway Comm'n. v. Gilich*, 609 So. 2d 367, 377 (Miss. 1992) (holding diminution from loss of view compensable); *Treuting v. Bridge & Park Comm'n*, 199 So. 2d 627, 633 (Miss. 1967); and (3) New Jersey, see *Ocean City v. Maffucci*, 740 A.2d 630, 640 (N.J. Super. Ct. App. Div. 1999).

265. See *Hayes*, 91 So. at 800 ("An upland owner must in all cases be permitted a direct, unobstructed view of the Channel . . ."); *Thiesen*, 78 So. at 501 (holding that the common law riparian owner enjoys the right of an unobstructed view over the waterbody); *Padgett v. Cent. & S. Fla. Flood Control Dist.*, 178 So. 2d 900, 904 (Fla. Dist. Ct. App. 1965) (citing *Thiesen*, 78 So. at 501).

266. *Ocean City*, 740 A.2d at 631-32.

267. *Id.* at 632.

268. *Id.* at 640.

269. *Id.* at 641.

270. *Id.* at 641 (citing *Pierpont Inn, Inc. v. California*, 70 Cal. 2d 282 (1969)).

compensation, with the right of view should be permissible only in the same types of circumstances in which the government could limit or cut off the waterfront owners direct contact and access to the waterbody. The creation of a better, wider public beach, the protection of the shoreline and buildings from storm damage, or the construction of a boardwalk to provide the public with better access and views of the ocean would not be among the acceptable purposes.

Whether recognition of the right of view will pose significant costs or other impairments of beach nourishment projects remains to be seen. In most instances, oceanfront owners are the ones seeking the sand and readily sign the necessary documents granting those responsible for the project the easements or other rights required for the project to go forward. However, there is anecdotal evidence that some beachfront owners are objecting to beach nourishment projects because the created dunes will interfere with their views and would prefer to have water lapping at a seawall or bulkhead. Of course, if seawall and bulkhead construction projects are banned or severely restricted, the beachfront owners' options are limited to either a beach nourishment project with dunes or ocean waters eroding away their land and buildings.

V. PROTECTING COASTAL LANDS: LITTORAL OWNER'S RIGHT TO CONSTRUCT PERMANENT EROSION CONTROL STRUCTURES

Faced with the loss of valuable seashore frontage and potential damage to, and destruction of, expensive beachfront homes or other structures as the natural processes of wind and wave action or periodic storms eat away at a shoreline, it is not surprising that owners of oceanfront property want to place rip-rap²⁷¹ seawalls, or other structures along the shoreline to protect their lands and buildings.²⁷² On the other hand, it is common scientific knowledge that the consequence of one landowner placing a structure such as a seawall along her portion of the shoreline results in a series of

271. "Rip-rap" are broken stones thrown together irregularly or loosely to construct a revetment, which functions as a type of seawall. See CORNELIA DEAN, *AGAINST THE TIDE: THE BATTLE FOR AMERICA'S BEACHES* 52 (1999).

272. A well-known example of this is the *Shell Island Homeowners Ass'n, Inc. v. Tomlinson* litigation. 134 N.C. App. 217, 517 S.E.2d 406 (1999). After North Carolina banned in 1995 the construction of hardened beach erosion control structures, oceanfront property owners threatened by erosion resorted to placing large sand bags to protect their land and buildings. See, e.g., Richard Stradling, *Sandbag Extension Granted*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 23, 2003, at B1; Mark Schreiner, *Bald Head Sandbag System Gets Senate OK: Bill a Matter of Fairness*, MORNING STAR (Wilmington, N.C.), July 17, 2003, at B1.

significant adverse consequences.²⁷³ The first is that water action and currents will cause even greater erosion to adjacent lands not similarly protected by a seawall.²⁷⁴ The second is that erosion of the coastline in front of the seawall will continue unabated.²⁷⁵ From these events follow at least two additional consequences. Neighboring landowners will be compelled to construct seawalls to protect their lands and buildings,²⁷⁶ and as erosion continues, it becomes necessary to build stronger, perhaps higher seawalls.²⁷⁷ The net adverse effect of these actions on the public interest is serious. The existence of seawalls and the natural process of erosion inevitably lead to the loss of the dry and wet sand beaches.²⁷⁸ Thus, the question arises: do

273. THE HEINZ CENTER, EVALUATION OF EROSION HAZARDS 58 (Apr. 2000) (description of adverse impacts of hard erosion control structures), *available at* http://www.heinzctr.org/NEW_WEB/PDF/erosnrpt.pdf#pagemode=bookmarks&view=Fit (on file with the North Carolina Law Review); *see also* PILKEY & DIXON, *supra* note 29, at 51–53 (identifying ten truths about shoreline armoring: (1) armoring destroys beaches, (2) no need for stabilization unless some builds too close to the shoreline, (3) small number of people create the need for armoring, (4) once you start, you can not stop, (5) costs more than property saved worth, (6) armoring begets more armoring, (7) armoring grows bigger, (8) armoring politically difficult issue because of long-term environmental impacts, (9) politically difficult because no compromise is possible, and (10) you can have buildings or beaches, not both).

274. As Cornelia Dean explains:

Through a process imperfectly understood, erosion is worse at the ends of seawalls, where they often experience severe scour. In part, this phenomenon may occur because the wall cuts the beach off from a source of sand. The underwater profile at the wall must steepen if the amount of sediment in the water is to remain constant. As a result, many walled towns have repeatedly had to extend their walls when these ‘end effects’ began to threaten neighboring property or the survival of the walls themselves.

DEAN, *supra* note 271, at 53.

275. *Id.* (“If the beach is eroding, a seawall will cause it to disappear. A wall by its nature draws a line in the sand. But the ocean does not respect this line. It keeps moving in. Eventually it meets the wall. Result: no beach.”).

276. PILKEY & DIXON, *supra* note 29, at 52 (“Shoreline armoring begets more shoreline armoring. All structures eventually cause sand supply deficits on adjacent beaches, resulting in a need for armoring. Seawalls get longer, single groins become groin fields, and offshore breakwaters are extended.”).

277. Pilkey and Dixon note:

Shoreline armoring grows bigger. Shoreline engineering structures are inevitably damaged or destroyed and are then replaced by grander ones. Often the reason a structure is damaged is because the waves have removed the protective beach As the protective beach is diminished, walls must be increased in size.

Id. at 53.

278. PILKEY ET AL., *supra* note 6, at 91 (“Whenever a fixed, immovable object (e.g., a seawall or highway) is built adjacent to an eroding beach, the beach eventually jams up against the wall. Whatever is causing the shoreline retreat is unaffected by the wall, and erosion continues until the beach is gone.”).

oceanfront property owners have a common law right to take such action or may the State ban the construction of permanent, protective, beach-hardening structures to protect the dry and wet sand beaches, as has happened in North Carolina, without engaging in an unconstitutional taking of a common law property right?

A. Shell Island Homeowners Ass'n, Inc. v. Tomlinson

Until the 1970s, North Carolina did not regulate the construction of seawalls and other hardened erosion control structures along ocean shorelines.²⁷⁹ Prior to that time, when their structures were threatened with erosion, one response of private property owners was a seawall.²⁸⁰ A complete ban on the construction of seawalls was not imposed until 1985, when the CAMA rules were amended to provide:

Permanent erosion control structures may cause significant adverse impacts on the value and enjoyment of adjacent properties or public access to and use of the ocean beach, and therefore, are prohibited. Such structures include, but are not limited to: bulkheads; seawalls; revetments; jetties; groins and breakwaters.²⁸¹

This CAMA "hardened structure rule" was unsuccessfully challenged on a number of grounds in the *Shell Island Homeowners Ass'n, Inc. v. Tomlinson* litigation.²⁸²

The *Shell Island* case began during the early 1990s. At that time, the movement of the inlet adjacent to the Shell Island Condominium, located at the north end of Wrightsville Beach, North Carolina, was rapidly moving toward the structure.²⁸³ Soon, the continued erosion of the inlet shoreline posed such a threat that the property owners association sought permits to construct a seawall to protect the structure from being undermined by the waters and currents of the inlet.²⁸⁴ But, the permit was denied.²⁸⁵ The property owners association then sued the state alleging a denial of their common law

279. See *infra* note 310 and accompanying discussion.

280. See *infra* note 312.

281. N.C. ADMIN. CODE tit. 15A, r. 7H.0308(a)(1)(B) (Aug. 2002), available at http://www.nccoastalmanagement.net/Rules/Text/t15a_07h.pdf (on file with the North Carolina Law Review).

282. 134 N.C. App. 217, 517 S.E.2d 406 (1999).

283. *North Carolina Seawall Ban Stands up to Legal Challenge*, COASTAL SERVICES (Mar./Apr. 2000) ("By the mid-1990s, Mason Inlet was migrating south at a rate of a foot per day."), available at <http://www.csc.noaa.gov/magazine/2000/02/nc.html> (on file with the North Carolina Law Review).

284. *Shell Island*, 134 N.C. App. at 219, 517 S.E.2d at 409.

285. *Id.* at 220, 517 S.E.2d at 409-10.

property right to build an erosion control structure.²⁸⁶ In response to that claim, the Court of Appeals of North Carolina stated:

The invasion of property and reduction in value which plaintiffs allege clearly stems from the natural migration of Mason's Inlet, and plaintiffs have based their takings claim on their need for "a permanent solution to the erosion that threatens its [sic] property," and the premise that "[t]he protection of property from erosion is an essential right of property owners" The allegations in plaintiffs' complaint have no support in the law, and plaintiffs have failed to cite to this Court any persuasive authority for the proposition that a littoral or riparian landowner has a right to erect hardened structures in statutorily designated areas of environmental concern to protect their property from erosion and migration. The courts of this state have considered natural occurrences such as erosion and migration of waters to be, in fact, natural occurrences, a consequence of being a riparian or littoral landowner, which consequence at times operates to divest landowners of their property.²⁸⁷

Thus, the absolute prohibition embodied in the CAMA rule was upheld.²⁸⁸ Subsequently, in 2003, the North Carolina General Assembly passed legislation specifically banning the construction of erosion control structures on the ocean shoreline.²⁸⁹

On its facts, the result in *Shell Island* is correct, but the issue of whether waterfront property owners have any common law right to erect hardened structures in statutorily designated areas of environmental concern is not as simple as the court makes it appear. The evolving common law principles applicable to diversion of surface waters, custom, and past regulatory practices strongly suggest that property owners do have a qualified right to erect seawalls and

286. *Id.* at 228, 517 S.E.2d at 414.

287. *Id.*

288. All was not lost for the Shell Island owners. In 2002, as part of the Mason Inlet Renovation Project, the inlet was moved 3,000 feet to the north of the Shell Island Resort, and so far it appears to be relatively stable. See Gareth McGrath, *One Year Later, Mason Inlet's Move Earns Mixed Reviews*, MORNING STAR (Wilmington, N.C.), Mar. 14, 2003, at 1A. Subsequent to the opening of the new inlet, the old Mason Inlet was closed on March 14, 2002. *Id.*

289. See N.C. GEN. STAT. § 113A-115.1(b) (2003); see also *id.* § 113A-115.1(a)(1) (defining erosion control structures to include "a breakwater, groin, jetty, revetment, seawall, or any similar structure"). "'Ocean shoreline' means the Atlantic Ocean, the oceanfront beaches, and frontal dunes. The term 'ocean shoreline' includes an ocean inland and lands adjacent to an ocean inlet." *Id.* § 113A-115.1(a)(2).

other hardened structures to protect their land from erosion or other migration of waters.

B. The Common Law and Coastal Erosion Structures

Prior to the *Shell Island* decision, no North Carolina opinion addressed the rights of coastal landowners to build erosion control structures. Early North Carolina common law principles applicable to controlling surface waters suggest that no such right exists; whereas more recent cases would support the existence of such a right.

1. The Traditional Common Law Rules

Until the twentieth century, in the eastern United States, the law applied to diversion of surface waters could be divided into two competing approaches—the common enemy rule and the civil rule.²⁹⁰ Under the common enemy rule, surface water was viewed as the common enemy of all landowners and a landowner could take whatever steps necessary to protect her land from harm.²⁹¹ Although the most frequent subject of the rule was diffuse surface waters,²⁹² the rule also applied to ocean waters.²⁹³ Under that accepted nineteenth-century principle it was every oceanfront landowner for herself. Each landowner had the right to erect structures to protect her land from the ravages of the sea even if the consequence of that action was to force adjacent landowners to erect similar structures or face the loss of their lands and structures.²⁹⁴ The strict civil rule is the polar

290. See 2 WATERS AND WATER RIGHTS § 10.3(b), at 10-38 to -59 (Robert E. Beck ed., Lexis Nexis ed. 1991, repl. vol. 2000) [hereinafter 2 WATERS AND WATER RIGHTS]. The civil rule was also known as the “natural servitude rule.” *Id.* § 10.03(b)(2), at 10-50.

291. See *id.* § 10.03(b)(1), at 10-39.

292. See *id.* § 10.03(b), at 10-38.

293. See TARLOCK, *supra* note 14, at § 3.12 (“The initial common law rule was the common enemy rule The common law rule was adopted in England to allow coastal property owners to erect groins to protect their property, and states continue to adhere to it for similar policy reasons.”).

294. See *Grundy v. Brack Family Trust*, 67 P.3d 500, 506 (Wash. App. 2003) (applying common enemy rule to claim that neighbor’s seawall is nuisance), *petition for review granted*, 79 P. 3d 445 (Wash. 2003). In *Cass v. Dicks*, the Washington Supreme Court stated:

If a land owner whose lands are exposed to inroads of the sea, or to inundations from adjacent creeks or rivers, erects sea-walls or dams, for the protection of his land, and by so doing causes the tide, the current, or the waves to flow against the land of his neighbor, and wash it away, or cover it with water, the landowner so causing an injury to his neighbor is not responsible in damages to the latter, as he has done no wrong, having acted in self-defense and having a right to protect his land and his crops from inundation.

opposite of the common law “common enemy rule.” Under that rule, a landowner is liable for any interference with the natural flow of surface waters which causes injury to other lands.²⁹⁵ Application of that rule to coastal erosion control structures would prohibit their construction.²⁹⁶

2. The Modern Reasonable Use Rule

During the twentieth century, many jurisdictions abandoned these rules, adopting instead the concept of reasonable use as the standard for determining whether a landowner is liable for damage to neighboring landowners for actions interfering with natural water flow patterns.²⁹⁷ Initially the reasonable use rule was applied to actions affecting the flow of surface water,²⁹⁸ but more recently it has been explicitly applied to questions involving the rights of owners of oceanfront property.²⁹⁹ The reasonable use rule, in essence, applies the modern balancing test utilized in evaluating whether an activity is a nuisance to determine the liability, if any, of the owner of an erosion control structure to another property owner whose lands have been adversely impacted by the changes in water flow and circulation

44 P. 113, 114 (Wash. 1896) (internal citation omitted); *see also* *Lamb v. Reclamation Dist.* No. 108, 14 P. 625, 628 (Cal. 1887) (en banc) (applying common enemy rule to a large navigable river and the effects of the construction of a levee to protect adjacent lands from the river overflow); *King v. Comm’rs of Sewers for Pagham*, 108 Eng. Rep. 1075, 1077, 8 B & C 356, 358 (K.B. 1828) (adopting the common enemy rule). In his 1891 edition, the nineteenth-century water law authority, John M. Gould, stated:

The owners of lands exposed to the inroads of the sea . . . may erect walls and embankments to prevent the wearing away of the land or to protect it from overflow. It is lawful to embank against the sea, even when the effect may be to cause the water to beat with increased violence against the adjoining land . . .

GOULD, *supra* note 1, § 160, at 320–21.

295. *See* 2 WATERS AND WATER RIGHTS, *supra* note 290, § 10.03(b)(2), at 10-49 to -50; 5 WATERS AND WATER RIGHTS § 59.02(b)(3), at 196 (Robert E. Beck ed., Lexis Nexis ed. 1991, Supp. 2004) [hereinafter 5 WATERS AND WATER RIGHTS].

296. Other than the *Shell Island* case itself, the author has not found another case in which the civil rule was expressly or implicitly applied to coastal erosion control structures.

297. *See* 5 WATERS AND WATER RIGHTS, *supra* note 295, § 59.02(b)(7), at 746–53 (explaining that twenty-two states follow the reasonable use rule, seventeen states follow the civil rule, twelve states and the District of Columbia follow the common enemy rule, and that Alabama applies all three rules, with the application depending on the context).

298. 2 WATERS AND WATER RIGHTS, *supra* note 290, § 10.03(b)(3), at 10-59 to -68 (discussing the history of reasonable use rule). The reasonable use rule is becoming the dominant approach to drainage disputes. *Id.* § 10.03(b)(3), at 10-60 to -61.

299. *See, e.g.,* *Wilson v. Commonwealth*, 583 N.E.2d 894, 900, n.16 (Mass. App. Ct.) (noting that regulations prohibiting construction of rock revetment on beach area “essentially prevents the creation of a nuisance by property owners who would prevent the natural disposition of sand along the beachfront”), *aff’d* 597 N.E.2d 43 (Mass. 1992).

patterns caused by the structure. For example, in *Lummis v. Lilly*,³⁰⁰ in which the issue was liability associated with the maintenance of a groin,³⁰¹ the Supreme Judicial Court of Massachusetts stated that, in addition to whether the groin owner had obtained the proper permits,

[o]ther factors bearing on the reasonableness of the use are the purpose of the use, the suitability of the use to the water course, the economic value of the use, the social value of the use, the extent of harm that it causes, the practicality of avoiding the harm . . . , the protection of existing values of water uses, land, investments, and enterprise, and the justice of requiring the user who is causing the harm to bear the loss³⁰²

These criteria are the same criteria which the United States Supreme Court in *Lucas v. South Carolina Coastal Commission*³⁰³ suggested be used to determine whether a coastal regulation that prohibited any development on an oceanfront lot was an unconstitutional taking or not.³⁰⁴ What is interesting is that in both contexts, *Lummis* and *Lucas*, the underlying premise is the oceanfront property owner has the right to engage in the activity unless it is an unreasonable use and constitutes a nuisance.

3. The Law of North Carolina

Until 1977, North Carolina followed a modified civil rule to diffuse surface water litigation.³⁰⁵ Then, in *Pendergrast v. Aiken*,³⁰⁶ the Supreme Court of North Carolina jettisoned that rule and adopted the "reasonable use" rule.³⁰⁷ To the extent *Pendergrast*

300. 429 N.E.2d 1146 (Mass. 1982).

301. A groin is a small wall or barrier built perpendicular to the shoreline that is intended to trap sand moving in longshore currents. They can be made of wood, stone, concrete, steel, or other materials. Although groins are sometimes confused with jetties, jetties are built next to inlets and perform a different function. The purpose of a jetty is to keep sand from filling in navigation channels. PILKEY ET AL., *supra* note 6, at 91-93 (1998).

302. *Lummis*, 429 N.E.2d at 1150 (citing RESTATEMENT (SECOND) OF TORTS § 805A (1979)).

303. 505 U.S. 1003 (1992).

304. *Id.* at 1030-31.

305. 2 WEBSTER, *supra* note 242, § 16-10 ("North Carolina has never applied the 'common-enemy rule.'").

306. 293 N.C. 201, 236 S.E.2d 787 (1977).

307. *Id.* at 216, 236 S.E.2d at 796. The court did not see itself as jettisoning the civil rule. Instead, it read prior cases as gradually modifying the civil law rule until it became the "reasonable use rule." *Id.* at 211-14, 236 S.E.2d at 793-95. The court said:

We do not view the formal adoption of the rule of reasonable use as an innovation in the law of North Carolina. In the past, modifications in drainage water law have

recognizes the right of landowners to divert diffuse surface waters away from their land, the same reasoning applies to oceanfront property owners' diversion of ocean waters. Strengthening that conclusion is the fact that by the time of the *Pendergrast* decision the court already was applying the modern reasonable use doctrine to other aspects of North Carolina water law.³⁰⁸ So after *Pendergrast*, a reasonable conclusion is that the reasonable use doctrine applies to the resolution of all riparian and littoral water usage questions involving activities of private parties, including construction of erosion control structures.³⁰⁹

been piecemeal as required by time and circumstance. Our action today simply recognizes that fact and approves a rule.

Id. at 218, 236 S.E.2d 797-98.

308. See 2 WEBSTER, *supra* note 242, § 16-7, at 765 ("In North Carolina the 'reasonable use' doctrine of water usage which embodies the principle that all riparian owners on a watercourse have equal rights with respect to the removal and use of water from the watercourse."); *id.* § 16-9, at 770 ("With respect to percolating waters, North Carolina follows the 'reasonable use' doctrine."); see also Aycok *supra* note 204, (noting the Supreme Court of North Carolina's adoption of reasonable use rule for riparian rights).

309. The qualification "involving private parties" is necessary because of one important exception to the application of the reasonable use doctrine. The exception to the application of the reasonable use doctrine is that it does not apply to water diversions that injure private property when the entity responsible for the diversion has the power of eminent domain. In that situation, the entity can not escape liability for the damage it causes by claiming that the interference with the flow of surface or stream water was reasonable, but is strictly liable for the damage. See generally *Lea Co. v. Bd. of Transp.*, 308 N.C. 603, 304 S.E.2d 164 (1983) (I-40 ramps obstructed creek and caused overflow of water onto plaintiff's land); *Bd. of Transp. v. Terminal Warehouse Corp.*, 300 N.C. 700, 268 S.E.2d 180 (1980) (Board of Transportation changed water flow in stream with a culvert and retaining water). But see *Akzona, Inc. v. S. Ry. Co.*, 314 N.C. 488, 334 S.E.2d 759 (1985) ("A single instance of flooding with no possibility of recurrence, even if the direct result of Railroad's structure, is not a taking of Akzona's property."). According to the Supreme Court of North Carolina:

[T]he doctrine of reasonable use adopted in *Pendergrast* defines the extent to which a private landowner may interfere with the flow of surface water on the property of another [However, w]here the interference with surface waters is affected by such an entity [possessing the power to appropriate private property], the principle of reasonable use articulated in *Pendergrast* is superseded by the constitutional mandate that "[w]hen private property is taken for public use, just compensation must be paid."

Bd. of Transp., 300 N.C. at 705-06, 268 S.E.2d at 184 (1980) (quoting *Eller v. Bd. of Educ.*, 242 N.C. 584, 89 S.E.2d 144 (1955)). This exception is not applicable to the denial of an oceanfront property owner's application for a permit to build a seawall or other hardened shoreline protection structure and does not mean that the State is liable for any damages caused by ocean waters that result from the inability of the private property owner to build a seawall or other hardened shoreline protection structure.

C. Custom and Regulatory Practice

If past practice in North Carolina is any guide to whether a riparian or littoral owner has a right to erect a permanent erosion control structure, then it too supports the existence of such a right. The State did not seriously begin to regulate beach erosion control structures until 1979,³¹⁰ and a ban was not imposed until January 1985.³¹¹ Prior to that time, private oceanfront property owners built seawalls and other hardened erosion control structures in a number of locations along the North Carolina coast.³¹² This activity suggests a

A seawall may provide some protection to the oceanfront property it fronts, but it also has serious destructive consequences for adjacent oceanfront land owned by other individuals or entities, has the potential to destroy the dry sand beach, an area over which the North Carolina public has a common law right of use based on custom or the public trust doctrine, and may even destroy the wet sand beach, which is part of the state-owned public trust lands and also subject to public trust rights of use. There is nothing in the opinions creating the exception which in any way suggests that the State is somehow liable to a private property owner when the State acts reasonably to deny that property owner such a permit in order to protect other private property owners (who themselves could assert that the seawall was an unreasonable use), the public interest in dry sand beaches, or state-owned public trust lands. To suggest otherwise would be akin to asserting that an oceanfront property owner has a vested license to injure or destroy adjacent private and state-owned property and the public interest in the dry sand beach and that the State must pay to protect those public and private interests. That is a far cry from the type of cases in which the exception to the reasonable use doctrine has been applied.

310. See N.C. ADMIN. CODE tit. 15, r. 07H.0308 (Aug. 2002) (regulating specific use standards for ocean hazard areas), available at http://www.nccoastalmanagement.net/Rules/Text/t15a_07h.pdf (on file with the North Carolina Law Review). Rule 07H.0308(a) addresses ocean shoreline erosion control activities. This rule provided that, in emergency situations, property owners could obtain a permit "to protect . . . [threatened] structures [existing as of June 1, 1979] along the ocean front by means of bulkheads, seawalls, or similar structures . . ." *Id.* r. 07H.0308(a)(3). In 1971, authority for the "Protection of Sand Dunes Along The Outer Banks" was given to local governments and, in their absence, the North Carolina Environmental Management Commission. N.C. GEN. STAT. §§ 104-B3 to -B16 (repealed 1979). But it had "little impact upon the construction of erosion control structures." E-mail from Professor Spencer Rogers, Coastal Geologist, University of North Carolina at Wilmington, to Lauren Pogue, Research Assistant, University of North Carolina School of Law (Jun. 30, 2004) (on file with author).

311. PILKEY & DIXON, *supra* note 29, at 4 (explaining that Maine banned hard stabilization in 1982 and North Carolina followed suit in 1985).

312. According to David W. Owens, Associate Professor of Public Law and Government and Assistant Director, Institute of Government, University of North Carolina at Chapel Hill, no formal survey to determine the extent of beach hardening was done prior to the imposition of the beach hardening ban by the Coastal Resources Commission in 1985. But "[t]here were several instances of devices being installed all along the coast, but mostly very small scale instances." E-mail from David W. Owens, Associate Professor of Public Law and Government and Assistant Director, Institute of Government, University of North Carolina at Chapel Hill, to Professor Joseph Kalo, University of North Carolina School of Law (Jul. 19, 2004) (on file with author). At the time the ban was being considered, Professor Owen was an attorney and staff member of

recognition of a right, with regulation increasing as evidence of the harmful effects of such actions became clearer.

Coastal sound waters and shorelines are areas of statutorily designated areas of environmental concern³¹³ just as ocean shorelines are. Yet, it has been a common practice to construct permanent erosion control structures, such as bulkheads, along coastal sound shorelines.³¹⁴ Until 1978, the construction of bulkheads along the sound shoreline was not regulated.³¹⁵ The current CAMA rules, under the heading of "General Permit for Construction of Bulkheads and The Placement of Riprap for Shoreline Protection in Estuarine and Public Trust Waters,"³¹⁶ implicitly acknowledge the general right to construct such erosion control structures but regulate the placement of bulkheads to assure that the construction of a particular bulkhead does not harm adjacent riparian owners, interfere with public trust rights, or cause adverse environmental consequences.³¹⁷

the Coastal Resources Commission. And, from 1984 to 1989, he was the director of the Division of Coastal Management. He is a recognized authority on the North Carolina Coastal Management Act.

According to Professor Spencer Rogers, "a relatively long length of underdesigned concrete bulkhead [constructed after Hurricane Donna in 1960] is still in place in the center of Atlantic Beach. It . . . was buried by a beach nourishment project beginning in 1978. A shorter wooden bulkhead in Kure Beach was extensively repaired following Hurricane Fran in 1996 but is now buried behind . . . [a 1997] dune and beach nourishment" E-mail from Professor Spencer Rogers, Coastal Geologist, University of North Carolina at Wilmington, to Jessica Odom, Research Assistant, University of North Carolina School of Law (Jun. 30, 2004) (on file with author).

An example of the beach hardening which took place before the imposition of the ban can be found in photographs in ORRIN PILKEY ET AL., *HOW TO READ A NORTH CAROLINA BEACH* 136, fig. 7.2 (2004) (showing an old seawall at Casewell Beach, destroyed by Hurricane Bonnie in 1998). See Frank Tursi, *Experts Worry About Beach Projects' Large Scale Interference; Against the Tide?*, WINSTON-SALEM J., Mar. 12, 2001, at A1 (including a photo of seawall at Pine Knoll Shores pier).

313. See N.C. GEN. STAT. § 113A-113(b)(2), (8), (9) (2003); see also N.C. ADMIN. CODE tit. 15A, r. 7H.0205 (Aug. 1998); *id.* r. 7H.0207 (Aug. 1998) (regulating estuarine waters); *id.* r. 7H.0205 (Oct. 1993) (regulating public trust areas).

314. According to Mike Lopanski, while there are not definite numbers, he is comfortable saying that miles and miles of the sound shoreline are armored. Interview by Lauren Pogue with Mike Lopanski, Coastal Policy Analyst, N.C. Div. of Coastal Management (Jun. 12, 2004).

315. The first CAMA rule regulating construction of bulkheads and placement of riprap in estuarine and public trust waters went into effect in 1978. N.C. ADMIN. CODE tit. 15A, r. 7KH.0208 (Jun. 1981) (eff. Mar. 29, 1978) (regulating bulkhead and shoreline stabilization). The current regulations are found at N.C. ADMIN. CODE tit. 15A, r. 7H.1100 (Dec. 1991–Aug. 1998) (regulating general permit for construction of bulkheads).

316. *Id.* r. 7H.1100.

317. See *id.* r. 7H.1104(c) (Aug. 1998) ("There shall be no significant interference with navigation or use of the waters by the public by the existence of the bulkhead or the riprap authorized herein."). This regulation further states:

As a general matter, such erosion control devices are authorized for shorelines devoid of marsh grass and other wetland vegetation³¹⁸ so long as neighboring property owners do not object,³¹⁹ there is no interference with navigation or use of the waters by the public,³²⁰ and certain specific construction requirements are satisfied.³²¹ The sense of the CAMA rule is that, at the present time, riparian owners have a general right to erect erosion control structures, but the general right is subject to reasonable regulation to protect neighboring property owners' shoreline and public rights of navigation and public trust uses of coastal waters and resources.

D. Oceanfront Erosion Control Structures as Per Se Unreasonable

Application of the reasonable use doctrine does not mean that the State may not prohibit the construction of erosion control structures in certain situations or environments. In the context of *Pendergrast*, it is a matter of balancing the interests of individual landowners in an age of more intensive land use that necessitates modification of natural drainage patterns through the changing of the contours of the land and the installation of drainage systems.³²² The issue is generally whether the receiving landowners must bear the burden and costs of increased flows of surface water or whether the sending landowners must.³²³ In the context of seawalls and other erosion control structures the effect of the erosion control structure is not limited to neighboring privately owned lands. Such structures do change wave and water flow patterns in such a way as to increase the intensity of the wave and water action on neighboring littoral lands and increase the rate of erosion of neighboring lands.³²⁴ That is why

This permit will not be applicable to proposed construction where the Department has determined based on an initial review of the application, that notice and review pursuant to G.S. 113A-119 is necessary because there are unresolved questions concerning the proposed activity's impact on adjoining properties or on water quality; air quality; coastal wetlands; cultural or historic sites; wildlife; fisheries resources; or public trust rights.

Id. r. 7H.1104(d).

318. *Id.* r. 7H.1105(a) (Dec. 1991).

319. *Id.* r. 7H.1102(b)(1) (Jan. 1990).

320. *Id.* r. 7H.1104 (c), (d) (Aug. 1998).

321. *Id.* r. 7H.1105 (Aug. 1998).

322. *Pendergrast v. Aiken*, 293 N.C. 201, 217-18, 236 S.E.2d 787, 797-98 (1977).

323. *Id.*; see also 2 WATERS AND WATER RIGHTS, *supra* note 290, § 10.03(b)(3), at 10-59 to -68 (discussing the history of the reasonable use rule, its underlying policies, and factors important to its application).

324. See, e.g., DEAN, *supra* note 271, at 53 (describing "end effect"); see also Chris Dixon, *The Seawall Amendment: A Discussion*, at <http://www.surfermag.com/features/>

once one littoral owner constructs a seawall or other erosion control structure it becomes necessary for neighboring littoral owners to do the same to protect their shoreline.³²⁵ But structures also have a documented, serious, adverse impact upon public trust lands and rights. Erosion control structures may lead to the destruction of the dry sand beach, adversely affecting the public's right to use the shoreline and public trust waters.³²⁶ Therefore, it is arguable that such structures along ocean and inlet shorelines are *per se unreasonable* and can be banned as nuisances. In sound and coastal river waters where, at the present time and state of scientific knowledge, the impact upon public trust lands and waters does not appear as severe, owners of waterfront property may continue to construct erosion control structures subject to the reasonable use rule. Thus, the conclusion of the Court of Appeals of North Carolina in *Shell Island* is correct—oceanfront property owners have no common law or statutory right to construct permanent erosion control structures. Therefore, the ban on such structures does not constitute a compensable taking of any private property right of oceanfront property owners.³²⁷

VI. NO RIGHT TO PIER OUT INTO OCEAN WATERS

Earlier, in Part III of this Article, the right of access to the navigable portion of the waterbody was discussed. That traditional common law right is composed of two parts. The first is the right of access to the navigable portion of the water body, or deep water.³²⁸ The second is the related right, subject to reasonable restrictions, to pier out to reach deep or navigable water. There is an important distinction between these two common law rights. The right of access

oneworld/seawall/ (describing the “end around effect” of seawalls) (last visited Aug. 22, 2005) (on file with the North Carolina Law Review).

325. DEAN, *supra* note 271, at 53.

326. *Id.* at 53–56 (describing destructive effects upon public beaches); *see also* PILKEY & DIXON, *supra* note 29, at 40–42 (illustrating destructive effect with photographs).

327. In *Lucas v. South Carolina Coastal Commission*, the Court makes it clear that a regulatory prohibition of activities that constitute nuisances under state law are not compensable regulatory takings. 505 U.S. 1003, 1029–31 (1992); *see also supra* note 309 and accompanying discussion of the impacts of seawalls upon other landowners, including the state's common law public trust rights.

328. *See In re Protest of Mason*, 78 N.C. App. 16, 27, 337 S.E.2d 99, 105 (1985); 1 WATERS AND WATER RIGHTS, *supra* note 1, § 6.01(a)(1), at 6-6. “Deep water” is defined in section 146-64 of the General Statutes of North Carolina as “the depth reasonably necessary to provide and allow reasonable access for all vessels traditionally used in the main watercourse area.” N.C. GEN. STAT. § 146-64(10) (2003).

to deep or navigable waters is not subject to question; the right of oceanfront property owners to pier out is.

The right of access to deep water means there must be no *unreasonable impediments or obstructions* created to keep the waterfront owner from having access across the waterbody to the point at which it becomes navigable-in-fact.³²⁹ The area over which this right exists is called the “area[] of riparian access,”³³⁰ the outer limit of which is the line of deep water and the sidelines determined by drawing perpendicular sidelines from the deep water to the point at which the upland property line meets the shore.³³¹ For oceanfront property owners, deep or navigable-in-fact waters generally lie within a short distance of the shoreline; the frontage is not very extensive so the typical area of access would be small. So long as there are no unreasonable impediments or obstructions to accessing deep water, this right is satisfied.

The right to wharf or pier out means that, in order to access navigable-in-fact waters, the waterfront property owner may place structures—obstructions—seaward of the mean high tide line in state public trust waters and on state-owned public trust submerged lands. Frequently in opinions or in treatises the statement appears that any waterfront property owner, subject to reasonable regulation, has such a right.³³² In its unqualified form, that statement appears to be

329. See *Mason*, 78 N.C. App. at 25–28, 337 S.E.2d at 104–06. In *Mason*, the Marine Fisheries Commission leased a portion of state-owned submerged lands for a clam culture operation. Part of the leased area was within *Mason*’s area of riparian access. The trial court decided “the lease would interfere with . . . [his] rights to ‘navigation, recreation, [and] access to the navigable portions of Core Sound.’ ” *Id.* at 25, 337 S.E.2d at 104. Since the lease stated it was “subject to the lawful exercise of . . . [Mason’s riparian] rights,” and contained specific conditions, such as a 100 foot set-off from the shoreline, the court determined rights were adequately protected. *Id.* at 26–29, 337 S.E.2d at 105–06. See generally *Becker v. Litty*, 566 A.2d 1101, 1004–05 (Md. 1989) (holding the right to navigate the waterbody is a public right not a private riparian or littoral right); 1 WATERS AND WATER RIGHTS, *supra* note 1, § 6.01(a)(1), at 6–4 to –7 (explaining the riparian right is a right of access to the beginning of navigable-in-fact waters, it does not include the right to navigate the waterbody).

330. See N.C. ADMIN. CODE tit. 15A, r. 7H.1205(o) (Apr. 2003), available at http://www.nccoastalmanagement.net/Rules/Text/t15a_07h.pdf (on file with the North Carolina Law Review); see also *Mason*, 78 N.C. App. at 28, 337 S.E.2d at 106 (riparian access zone extends to navigable part of waterway and lateral boundaries determined in accordance with applicable CAMA regulation).

331. CAMA regulations contain a description of the area of riparian access for coastal waters, N.C. ADMIN. CODE tit. 15A, r. 7H.1205(o) (Apr. 2003), and illustrative diagrams, *id.* r. 7H.1205(r).

332. See 1 FARNHAM, *supra* note 15, § 62 at 279 (“The riparian owner is also entitled to have his contact with the water remain intact. This is what is known as the right of access, and includes the right to erect wharves to reach the navigable portion of the stream. The

incorrect. Owners of land abutting interior sound waters, coastal and inland rivers, and lakes have such a right, but insofar as oceanfront property owners are concerned, no such right in reality exists. Although it is true that the Supreme Court of North Carolina has on two occasions stated that oceanfront owners have such a right, on both occasions the statement was pure dicta. In *Capune v. Robbins*,³³³ the issue was whether a pier owner had the legal right to throw pop bottles at a surfer who was passing under his pier.³³⁴ As part of its discussion, the court accepted the right of the owner to build the pier, but held that ownership of the pier did not include the right to control the waters below the pier and use pop bottles to discourage surfers from passing under the pier. Two years later, in *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*,³³⁵ the issue was whether the owner of a pier destroyed by a hurricane and storms, whose shoreline uplands had completely eroded away, still retained title. The court held he did not retain title to the area after it was raised above the mean high water mark as the result of a government beach rehabilitation project.³³⁶ In that case, again in dicta, the court stated that a "littoral owner may . . . in exercise of his right of access, construct a pier in order to provide passage from the upland to the sea."³³⁷ Therefore neither case provides an analysis of, or justification for, the assumed right of an oceanfront owner to construct a pier. Furthermore, even if the assumed right exists, it only enables an owner to reach deep or navigable waters,³³⁸ which for the most part lie within a few feet of the shoreline, and not several hundred feet. Therefore, if there is such a right, any such piers would be rather short and not of the length of the typical commercial ocean pier. The typical ocean pier extends a considerable distance out into the ocean, a distance that is greater than that needed to reach "deep"

wharfage right is subject to several limitations, however . . ."); see also GOULD, *supra* note 1, § 168, at 334–36 (discussing the right to wharf out in the United States, noting, "[i]n this country this rule is subject to reasonable limitations"); 1 WATERS AND WATER RIGHTS, *supra* note 1, § 6.01(a)(2), at 6-20 to -42 (discussing right to wharf out and regulations that the federal and state governments have placed on that right); *supra* note 19 and accompanying text.

333. 273 N.C. 581, 160 S.E.2d 881 (1968).

334. *Id.* at 587, 160 S.E.2d at 885.

335. 277 N.C. 297, 177 S.E.2d 513 (1970).

336. *Id.* at 301, 177 S.E.2d at 515

337. *Id.* at 303, 177 S.E.2d at 516–17.

338. See, e.g., *In re Protest of Mason*, 78 N.C. App. 16, 28, 337 S.E.2d 99, 105–06 (1985) (holding that right of access only extends to navigable part of waterbody); *Bond v. Wool*, 107 N.C. 139, 147–52, 12 S.E. 281, 284–86 (1890) (discussing qualified riparian and littoral right to pier out to navigable (deep) water).

or “navigable waters.” The State, of course, may authorize the construction of lengthy ocean piers and grant easements for that purpose.³³⁹ But the pier would exist as a matter of grace, not right. All other decided cases in which the right to wharf-out or construct a pier was in issue involved inland waters, not ocean waters. Therefore I would assert, despite the language of *Capune* and *Carolina Beach*, it is an open question whether oceanfront or inlet front property owners have the littoral right to wharf-out or construct piers. And, an examination of the historical evolution of that littoral right and the practical and legal impediments to constructing ocean and inlet piers leads to a conclusion that oceanfront and inlet front owners have no such littoral right.

At early common law, riparian and littoral owners did not have a right to wharf-out or construct piers. Absent the express permission of the Crown, the placement of wharfs, piers, or other structures below the mean high water mark was viewed as an enjoined encroachment upon public trust lands, which could be seized, removed or destroyed at the discretion of the Crown.³⁴⁰ However, in this country, from its earliest days, the necessity of wharves and piers to the promotion and maintenance of water commerce and travel dictated a different approach. Riparian and littoral owners in port and harbor areas and elsewhere were encouraged to build wharves, piers, and other similar facilities essential to the water transportation of cargo and people.³⁴¹ By the end of the nineteenth century, this custom had evolved into a common law right to erect wharves, piers and other facilities.³⁴² But this “right” was constrained by the public’s right of use of navigable waters. If a wharf, pier, or other structure

339. N.C. GEN. STAT. § 146-12 (2003) (authority to grant easements to riparian and littoral owners in state-owned lands covered by navigable waters).

340. ANGELL, *supra* note 34, at 132–33; GOULD, *supra* note 1, § 167, at 334.

341. ANGELL, *supra* note 34, at 125–26, 163; *see also* 1 FARNHAM, *supra* note 15, § 113, at 526.

342. In his 1826 treatise, Joseph Angell argues that the custom of encouraging the littoral and riparian owners to construct wharves, piers and similar facilities below the mean high water mark has in fact become a common law property right of such owners. ANGELL, *supra* note 34, at 125–63. By the time Gould wrote his 1883 *A Treatise on the Law of Waters*, the existence of the common law right appears to be well established in most states. GOULD, *supra* note 1, § 140, at 281 (“The right to build out wharves or piers into public waters, as incident to the ownership of the adjoining land, is a riparian right”); *see also id.* § 168 at 334 (“In this country this rule is subject to reasonable limitations”). And, in his treatise on *The Law of Waters and Water Rights*, Henry Farnham states that “it therefore became established at an early date that it was lawful for the owner of the shore to erect a wharf and other necessary adjuncts to the interchange of commerce upon it” 1 FARNHAM, *supra* note 15, § 113, at 526; *see also id.* § 113b, at 533–39 (describing the law in the United States as of 1904).

interfered with the public right of navigation and commerce, including the use of a harbor or port, then the interference was a public nuisance and could be removed.³⁴³ To prevent such interferences and to assure the safe and efficient operation of commercially important harbor and port areas, the actual exercise of the right to place structures such as piers or wharves into public water has, unlike other littoral and riparian rights, been the subject of extensive and detailed government regulation.³⁴⁴ Construction of an ocean pier requires a state easement, state and federal permits and associated environmental impact studies.³⁴⁵

Not only is the right to wharf-out or construct piers highly regulated, but realistically in coastal areas, commercial wharfs and piers are to be found in sheltered bays and harbors, and recreational piers, in the sheltered waters of sounds and coastal rivers and streams; piers are not found along the ocean shoreline. The number of piers that actually exist along North Carolina's ocean shoreline is very small.³⁴⁶ Except for the Army Corps of Engineers' Research Pier in

343. See ANGELL, *supra* note 34, at 132–33, 150, 162; GOULD, *supra* note 1, § 140, at 281–82.

344. See ANGELL, *supra* note 34, at 127; 1 FARNHAM, *supra* note 15, § 110(b), at 518–19, § 113, at 528, § 113(b), at 533; GOULD, *supra* note 1, § 138, at 276–79; § 168, at 334–36. Farnham and Gould differ slightly on the scope of the right. Farnham states that “a riparian owner has the right, by virtue of his ownership, to connect his shore line by artificial connections with outside navigable water, subject to such regulations—not amounting to prohibition—as the state may establish . . .” 1 FARNHAM, *supra* note 15, § 113b, at 533, whereas Gould states that the right is subject to “the common rights of the people in these waters.” GOULD, *supra* note 1, § 168, at 334.

345. Among the permits required would be North Carolina CAMA major development permit and a USACE permit.

346. Along the whole 301 miles of North Carolina coastline, as of May 24, 2005, there appear to be only twenty-seven ocean piers. There are no ocean piers in Currituck County; eight in Dare County (U.S. Army Corps of Engineers' Research Pier, Avalon, Nags Head, Jennette's, Outer Banks, Rodanthe, Avon, and Frisco); none in Hyde County; five in Carteret County (Triple S, Sportsman's, Oceanana, Bogue Inlet, and Sheraton); four in Onslow and Pender Counties (Salty's/Seaview, Surf City, Riseley [owned by the U.S. Marine Corps], and Jolly Roger); four in New Hanover County (Johnnie Mercer, Oceanic, formerly Crystal pier, Carolina Beach and Kure); and six in Brunswick County (Yaupon, Long Beach, Ocean Isle, Ocean Crest, Holden Beach, and Sunset Beach). E-mail from Stacy Peterson, Outer Banks Chamber of Commerce, to Jessica Odom, Research Assistant, University of North Carolina School of Law (May 2005) (containing information relating to the Currituck County and Dare County piers) (on file with author); Telephone interview with William N. Lovelandy, Jr., Office of Counsel, Engineer Research and Development Center (Jan. 2005) (discussing information relating to the Dare County U.S. Army Corps of Engineers pier); E-mail from Margie Brooks, Greater Hoke County Chamber of Commerce, to Jessica Odom, Research Assistant, University of North Carolina School of Law (Feb. 2005) (containing information relating to Hyde County) (on file with author); Telephone interview with Laura Wright, Carteret County Chamber of Commerce (May 2005) (discussing information relating to the Carteret

Duck and the Oceanic restaurant pier in Wrightsville Beach, all of these oceanfront piers are long commercial ones,³⁴⁷ the construction of which was not by right, but required an easement from the state and state and federal permits. Part of the reason for this is no doubt practical, and another part is legal. Piers in oceanfront areas pose problems not presented by the placement of piers in sound waters or coastal rivers. The beaches, certainly seaward of the mean high tide line and perhaps extending even to the vegetation line, are open to public use. To protect the public right to use the beach, any pier must be built high enough that

the passage under the pier must be free and substantially unobstructed over the entire width of the foreshore. This means that from high to low water mark it must be at such a height that the public will have no difficulty in walking under it

County piers); Telephone interview with Annie Walker, Jacksonville/Onslow County Chamber of Commerce (May 2005) (discussing information relating to the Onslow and Pender County piers); Telephone interview with Karen Warren, Cape Fear Coast Convention and Visitors Bureau (May 2005) (discussing information relating to the New Hanover County piers); Telephone interview with Brunswick County Chamber of Commerce (Feb. 2004) (discussing information relating to Brunswick County).

As a result of storm damage, a number of piers no longer exist: Kitty Hawk (Dare County); Iron Steamer, Indian Beach, and Emerald Isle (Carteret County); Scotch Bonnet, Ocean City, Barnacle Bill's (Onslow and Pender Counties); and Center (New Hanover County). E-mail from Stacy Peterson, Outer Banks Chamber of Commerce, to Jessica Odom, Research Assistant, University of North Carolina School of Law (May 2005) (containing information relating to the Currituck County and Dare County piers) (on file with author); Telephone interview with Laura Wright, Carteret County Chamber of Commerce (May 2005) (discussing information relating to the Carteret County piers); Telephone interview with Annie Walker, Jacksonville/Onslow County Chamber of Commerce (May 2005) (discussing information relating to the Onslow and Pender County piers); Telephone interview with Karen Warren, Cape Fear Coast Convention and Visitors Bureau (May 2005) (discussing information relating to the New Hanover County piers).

There are only fifty feet of Jennette's Pier still standing, but there are plans to rebuild sometime in the near future. E-mail from Stacy Peterson, Outer Banks Chamber of Commerce, to Jessica Odom, Research Assistant, University of North Carolina School of Law (May 2005) (on file with author).

347. Of the twenty-seven existing ocean piers on the North Carolina coast, only the Army Corps of Engineers' Research Pier (Dare County) and the Oceanic restaurant pier (New Hanover County) do not allow public fishing. Telephone interview with William N. Lovelandy, Jr., Office of Counsel, Engineer Research and Development Center (Jan. 2005) (discussing information relating to the Dare County U.S. Army Corps of Engineers pier); Telephone interview with Karen Warren, Cape Fear Coast Convention and Visitors Bureau (May 2005) (discussing information relating to the New Hanover County piers). No new pier has been constructed for at least a decade, if not longer. Telephone interview with Doug Huggett, Manager, CAMA Major Permits, North Carolina Division of Coastal Management, Morehead City office (May 27, 2005).

when the tide is low or in going under it in boats when the tide is high.³⁴⁸

In addition, allowing placement of a large number of piers along the shoreline would itself significantly hamper the public's ability to use the beach. That no doubt provides both part of the reason so few ocean piers exist and part of the legal justification for limiting the construction and number of piers.

Building ocean piers, even small ones, is expensive³⁴⁹ and owners of piers have to confront the consequences of the dynamic nature of wind, wave, and storm action along the Atlantic shoreline. Unless a pier is constructed of extremely sturdy materials, it will not withstand the forces of nature that characterize the coast. Every year even well-constructed, large commercial ocean piers succumb to hurricanes, storms, winds and waves.³⁵⁰ So the expense of constructing and maintaining a pier and associated risks undoubtedly dissuade the few who might be interested in having a private ocean pier. Finally, most oceanfront owners really have no need for such piers. Most probably don't have ocean-going craft, and those that do probably prefer to dock or anchor their vessels in calmer, protected waters.

Of course, some oceanfront owners might still like a private ocean pier. But, state Coastal Area Management Act (CAMA) regulations implicitly prohibit them. CAMA regulations state:

(d) The following types of water dependent development shall be permitted seaward of the oceanfront setback requirements . . . if all other provisions of this Subchapter and other state and local regulations are met:

348. *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 303, 177 S.E.2d 513, 516 (1970) (quoting *Capune v. Robbins*, 273 N.C. 581, 589, 160 S.E.2d 881, 886 (1986)).

349. One estimate was that it cost \$800 to \$1,000 a foot to build an ocean pier on wooden pilings. Jerry Allegood, *Tides Turning on Tar Heel Piers*, NEWS & OBSERVER (Raleigh, N.C.), Jul. 8, 1999, at A1. The Johnnie Mercer pier was rebuilt using concrete. The owner declined to comment on the cost. *Id.*

350. Between 1996 and 1999, "a mix of storms and hurricanes has reduced the fishing piers from 32 to 26." *Id.* According to Grace Construction Products, the company that rebuilt the Johnnie Mercer pier in 2002, "[s]ince 1996, one-third of North Carolina's fishing piers have been forced to close in the aftermath of a series of destructive storms." Grace Construction Products, Concrete Admixtures, Project Profiles, Johnny Mercer's Fishing Pier, at http://www.na.graceconstruction.com/template.cfm?page=/concrete/concrete_projprof_mercers.html&did=1 (last visited Jun. 2, 2005) (on file with the North Carolina Law Review).

(1) piers providing public access³⁵¹

The regulations make no mention of private oceanfront piers as a permissible form of development. The absence of any allowance for private piers and the absence of such piers from the coastline strongly suggest that oceanfront property owners have no littoral right to construct and place piers in ocean waters. The commercial ocean piers that exist are there not by right but by the grace of the State.

CONCLUSION

For over 200 years the rights of oceanfront property owners have been evolving through the common law and legislative process. The current list of littoral rights for oceanfront property owners would include

(1) The right to all natural additions to the shoreline whether the result of accretion or avulsion.

(2) The right to remain in contact with the ocean or inlet, which right is subject to limitation by the State to protect legitimate public trust interests. Such right may not be taken or significantly impaired as the result of beach nourishment projects or otherwise without payment of compensation or providing a statutory substitute except when necessary to protect legitimate public trust interests.

(3) The right not to have unreasonable impediments or interferences with access to the beginning of the navigable portion of ocean or inlet waters.

(4) The right to make reasonable use of adjacent ocean and inlet waters.³⁵²

But the rights would not include

(1) A right to construct erosion control structures without permission of the State.

351. N.C. ADMIN. CODE tit. 15A, r. 7H0309(d)(1) (Sept. 2002), *available at* http://www.nccoastalmanagement.net/Rules/Text/t15a_07h.pdf (on file with the North Carolina Law Review).

352. This particular right was not the subject of discussion in this Article, but as of this point in time no one has challenged the right of an oceanfront property owner to fish from the shoreline, swim in adjacent ocean waters, or make similar non-consumptive uses of adjacent ocean waters. Such uses by an oceanfront property owner would be no different than such uses by the public exercising public trust rights.

- (2) A right to pier out into ocean waters without permission of the state and federal government.

Whether North Carolina oceanfront owners have the right of view is not clear. But if such a right exists, it should be treated the same as the right to remain in direct contact with ocean and inlet waters. All the listed rights are subject to being lost if through the natural process of erosion or avulsive forces, all of the oceanfront property becomes submerged land lying under ocean or inlet waters. When the land is gone, all common law claims to the land and all littoral rights are forever gone as well.

